TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. 167.

NASHUA SAVINGS BANK, PETITIONER,

vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY
COMPANY, LIMITED.

N WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIRST CIRCUIT.

[illegible]

[illegible]

(18,268.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 2, 1902.

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EXHIBIT A.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1900.

No. 303.

Nashua Savings Bank,
DEFENDANT, PLAINTIFF IN ERROR,
v.
Anglo-American Land Mortgage and Agency Company, Limited,
PLAINTIFF, DEFENDANT IN ERROR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW HAMPSHIRE,
JUDGMENT IN CIRCUIT COURT, MARCH 16, 1899.

CERTIFIED COPY

OF

RECORD AND ALL PROCEEDINGS IN SAID CAUSE TO AND INCLUDING JUNE 14, 1901.

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1 United States Circuit Court of Appeals for the First Circuit, October Term, 1898.

NASHUA SAVINGS BANK, Defendant, Plaintiff in Error,
v.
ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited, Plaintiff, Defendant in Error.
No. 303.

Writ of Error.

[L. S.] UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of New Hampshire, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Anglo-American Land Mortgage and Agency Company, Limited, a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland, and having its principal office and situs in the city of London, in said kingdom, and a citizen of Great Britain, and an alien, and Nashua Savings Bank, a corporation organized under the laws of the State of New Hampshire, and having its situs at Nashua in said State and district, and a citizen of said State and district, a manifest error hath happened, to the great damage of the said Nashua Savings Bank, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the first circuit, together with this writ, so that you have the same in the city of Boston, Massachusetts, on the twenty-seventh day of July next, in the said circuit court of appeals; that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

2 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

FREMONT E. SHURTLEFF,
Clerk of the Circuit Court of the United States, District of New Hampshire.

Allowed to operate as a supersedeas by consent.

W. L. PUTNAM,
Circuit Judge.

July 11, 1899.

CONCORD, N. H., *July* 8, 1899.

DEAR SIR: In the matter of The Anglo-American Land Mortgage & Agency Company (Limited) *v.* Nashua Savings Bank, in which judgment has lately been rendered for the plaintiff, the United States marshal for the district of New Hampshire, having in his possession eight thousand dollars of United States bonds to secure said judgment, the plaintiff waives the giving by the defendant of a supersedeas bond to secure the judgment and assents to the giving of the cost bond only, as approved by you on the twenty-eighth day of June, 1899, in taking the case to the circuit court of appeals on writ of error, and to the approving of the citation to operate as a supersedeas.

WILLIAM TUTHERLY,
Counsel for Anglo-American Land Mortgage & Agency Co.

Hon. William L. Putnam, United States circuit judge, Portland, Me.

Return of Circuit Court on Writ of Error.

CIRCUIT COURT OF THE UNITED STATES, *District of New Hampshire*, } *ss:*

And now, here, the judges of the circuit court of the United States, in and for the district of New Hampshire, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States circuit court of appeals for the first circuit, as within commanded.

In testimony whereof, I, Fremont E. Shurtleff, clerk of said circuit court of the United States, in and for the district of New Hampshire, have hereto set my hand and the seal of said court this twenty-sixth day of July, A. D. 1899.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

3 *Transcript of Record of Circuit Court.*

(Filed in circuit court of appeals July 27, 1899.)

CIRCUIT COURT OF THE UNITED STATES, *District of New Hampshire*, } *ss:*

At a circuit court of the United States for the first circuit begun and holden at Concord within and for the district of New Hampshire on the eighth day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: Honorable William L. Putnam, circuit judge; Honorable Edgar Aldrich, district judge.

ANGLO-AMERICAN LAND MORTGAGE AND Agency Company (Limited)
v.
NASHUA SAVINGS BANK. } No. 420, Law Docket.

The Anglo-American Land Mortgage and Agency Company (Limited), a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland and having its principal office and situs in the city of London, in said kingdom, and a citizen of Great Britian, and an alien, against the Nashua Savings Bank, a corporation organized under the laws of the State of New Hampshire, and having its situs at Nashua in said State and district, and a citizen of said State and district.

Declaration.

(Filed May 20, 1896.)

First count. In a plea of the case for that the said defendant heretofore, to wit, on the first day of September, A. D. 1894, at said London, to wit, at Nashua in the State of New Hampshire in the United

States of America, was indebted to the said plaintiff in a large sum of money to wit, seven thousand dollars for a certain call and
4 assessment made by said company in pursuance of its charter
and by-laws, at said London, to wit, on the 10th of July, A. D. 1894, and to be paid on the first day of September, 1894, upon the defendant's subscription to a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company, which subscription had heretofore been made and subscribed in due form by said defendant, to wit, at said Nashua, and of the said assessment and call the said defendant had notice at Nashua, in the State of New Hampshire, heretofore to wit, on the the eleventh day of July, A. D. 1894, and thereafter to wit, on the first day of September, A. D. 1894, at said Nashua in consideration thereof the defendant then and there promised the plaintiff to pay the said sums on demand with interest at the rate of seven per cent. per annum from the time the same became due and payable as aforesaid.

Yet, though often requested, the defendant has never paid the said several sums of money or any of them, but has neglected and refused so to do.

Second count. And, also, in a further plea of the case for that the plaintiff avers that it is a corporation duly organized and existing under the laws of the United Kingdom of Great Britian and Ireland, and having its principal office and situs at the city of London in said kingdom, and is a citizen of said London; that by the provisions of the articles of association and incorporation of said company and the rules and regulations of said corporation that were in force at and before the time the said defendant became the subscriber to and owner of the shares of the capital stock of said corporation as hereinafter set forth, the said corporation was authorized and empowered to make calls upon its shareholders from time to time in respect to all moneys unpaid on their respective shares, and each shareholder would be liable to pay the amount of calls so made as to the persons and at the times and places appointed by the said corporation, and that shareholders should be liable to pay interest at seven per centum per annum from the day appointed for payment of such call to the time of the actual payment of the calls in arrears.

And the plaintiff further avers that James Lewis Lombard, heretofore, to wit, on the thirtieth day of August, A. D. 1883, was
5 the owner of one thousand shares of ten pounds each, English
or sterling money, par value of the capital stock of the said corporation, which shares had theretofore been subscribed for and purchased by him, the said Lombard, and the same had been legally transferred to him and his heirs and assigns, and accepted and held by him, the said Lombard, for himself, his heirs and assigns, subject to the articles of association and the rules and regulations of said corporation as aforesaid; that upon said one thousand shares two pounds each of English money had been paid and eight pounds each remained unpaid.

That on said thirtieth day of August, A. D. 1883, by an assignment in writing in due form of law, the said James Lewis Lombard sold, assigned, transferred and delivered to the defendant his said one thousand shares of the capital stock of the plaintiff corporation, and the said shares were then and there accepted by it, the said defendant, subject to the articles of association and rules and regulations of the plaintiff corporation, and said assignment was afterwards, to wit, on the day last aforesaid, at the request of the said defendant, accepted by said plaintiff and duly registered on the books of said corporation, of which the defendant then and there had knowledge, and the said defendant, ever since said assignment and registration last aforesaid, has been the registered and legal holder of said one thousand shares; and in consideration thereof, then and there, to wit, at said Bristol, promised to pay said plaintiff all such calls upon said shares as the said plaintiff might make from time to time, if not exceeding one pound English or sterling money upon each share at any one time, to the person and at the times appointed by the said corporation, with interest at the rate of seven per cent. per annum from the day appointed for the payment of such call to the time of the actual payment of the calls in arrears.

And the plaintiff further avers that on the tenth day of July, A. D. 1894, the said corporation agreeably to its articles of association and rule- and regulations aforesaid, made a call upon its shareholders, including the defendant, which was then and there the legal owner and holder of all the aforesaid one thousand shares, of one pound
sterling or English money per share, payable on the first day
6 of September, A. D. 1894, at the said company's office in said
London, of which said call the said defendant had notice at said Nashua afterwards, to wit, on the same tenth day of July, A. D. 1894.

Yet the said defendant, though often requested, has not paid the amount of the said call upon its said shares as aforesaid or any part thereof.

Third count. And also in a further plea of the case for that the said defendant heretofore, to wit, on the second day of December, A. D. 1895, at said London, to wit, at Nashua in the State of New Hampshire in the United States of America, was further indebted to the said plaintiff in a large sum of money, to wit, eight thousand dollars for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the tenth day of July, A. D. 1895, and to be paid on the second day of December, A. D. 1895, upon the defendant's subscription to a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company, which subscription had theretofore been made and subscribed in due form by said defendant, to wit, at Nashua, and of the said assessment and call the said defendant had notice at Nashua in the State of New Hampshire, heretofore, to wit, on the second day of December, A. D. 1895, and thereafter, to wit, at said Nashua, on the second day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent. per annum from the time the same became due and payable as aforesaid. Yet though often requested, the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do, to the damage of the said plaintiff (as it says) the sum of fourteen thousand dollars.

This cause, returnable at the August term, A. D. 1896, of this court, was for the purposes of pleading under rule 12 of this court, docketed on the twentieth day of May, A. D. 1896, and an order on the defendant to plead within one calendar month was entered on said twentieth day of May, and thereafter, to wit, on the eighteenth day of June, A. D, 1896, the defendant filed the following plea and brief statement:—

7 *Defendant's Plea and Brief Statement.*

(Filed June 18, 1896.)

And now the defendant comes, etc., when, etc., and says it never promised the plaintiff in the manner and form it has declared against it, and for this puts itself upon the country.

By its attorneys, J. H. S. FRINK.
C. J. HAMBLETT.

The plaintiff will take notice that the defendant makes the following brief statement of its defence:

(1.) It denies the said plaintiff corporation was ever duly organized, or that all the shares necessary to enable said corporation to duly and legally organize have even been subscribed for or taken.

(2.) It denies that James Lewis Lombard was ever the *bona fide* owner and holder of the stock it is alleged in plaintiff's declaration was sold, assigned, transferred and delivered to said defendant, or that defendant ever accepted the assignment of the same.

(3.) It says that said James Lewis Lombard conspired with the plaintiff company to make sale to said defendant of said shares, through false and fraudulent representations, and that the sale and acceptance to said defendant in plaintiff's declaration alleged was procured by the fraudulent and false representations of said James Lewis Lombard, acting for and in behalf of the plaintiff company.

(4.) It says that said James Lewis Lombard, conspiring with the plaintiff company, and with full knowledge on the part of the plaintiff, sold said stock to the said defendants upon the false and fraudulent representation and promise, that there never should be a call for more than two pounds sterling per share on the subscription to said stock, and the call and assessment in the suit is in excess of said sum.

(5.) It says that said James Lewis Lombard, with the full knowledge and authority on the part of the plaintiff to make the representations hereinafter recited, in order to induce said defendant to purchase said shares, represented to it that the capital stock
8 of said company was placed at ten pounds sterling per share,
because it was the English method of doing business, and

that it was necessary to do so to comply with the English law or custom in such cases, in order to absorb the surplus, which he represented would accumulate from the profits of the business of said corporation, and to enable the company to increase its capital stock if desirable, by making dividends from its surplus, and that said representations were false and fraudulent, and the said defendant in making said purchase relied upon the same.

(6.) It says that defendant was induced to purchase said stock, relying upon the promise of said James Lewis Lombard, with the full knowledge and assent of the plaintiff company, that the American stockholders should be represented in the board of officers of said company and have a voice in the management of its affairs, but the plaintiff corporation has refused and neglected to choose any such officers, and did not so intend at the time of such representations, with a view of making the fraudulent call and assessment in plaintiff's declaration alleged.

(7.) It says that the plaintiff corporation has purposely and with a view to making unlawful assessments and calls, intentionally debarred the American stockholders from attending any meeting of said company, by neglecting to give the American subscribers to stock in said company, including the defendant, seasonable notice of the meetings of said company, at which said alleged assessments were voted, so that it would be possible for them to attend said meetings, and they did not attend said meetings, for want of such seasonable notice, and the defendant will claim that the assessments are invalid, for this and other causes.

(8.) It says the assessment declared upon us was not a legal assessment against the stockholders in said company, because no notice to the stockholders was ever given of a meeting to consider the subject of making an assessment upon said stock, so as to render it possible for the stockholders to be present or to be represented at such meeting.

(9.) It says the assessments attempted to be collected in this suit are invalid, unlawful and unauthorized.

(10.) It says that no assessment whatever was made, or is
9 alleged to have been made, upon the stock alleged to have
been sold, assigned, transferred and delivered to the defendant by said James Lewis Lombard, since said alleged sale, assignment, transference and delivery.

(11.) It says that defendant never subscribed for any of the stock of said plaintiff corporation, nor was it at the time of said alleged assessment nor has it ever been the owner of any such stock.

And at the August term, A. D. 1896, the parties appeared by their respective attorneys, and thence the action was continued from term to term to the October term, A. D. 1897, of this court, when, to wit, on the nineteenth day of October, A. D. 1897, a jury of twelve men, duly qualified, was empanelled and sworn to try the issues between the parties according to the law and the evidence submitted, and thereafter, to wit, on the twentieth day of October, A. D. 1897, by agreement of counsel the case was withdrawn from the jury, and the following stipulation filed:

Stipulation.

(Filed October 20, 1897.)

The following agreement is hereby made in the above-entitled action:

The defendant to pay the call of July 10, 1894, in the sum of $5,914.71, within ten days, the taxable costs in the above suit, the same to be taxed by the clerk and the suit to be continued as to balance of the action upon the call of £1 5s. of Oct. 4, 1895.

It is further agreed that the plaintiff by its officers or some authorized agent or agents and attorney will meet a committee representing the American shareholders in the plaintiff company and undertake to determine the value of the assets of said company for the purpose of ascertaining how much money, in addition to the amount the company has on hand, will be required with such assets, the value of which is undertaken to be determined as aforesaid, to meet the liabilities of said corporation or company, and in case it shall be ascertained upon such valuation that additional
10 funds are needed over and above said payment, to meet the
liabilities of said company, this defendant will contribute such further amount upon suit now pending as shall be required to meet its equitable share, upon the payment of which this suit shall be dismissed, and defendant's stock at its option shall be surrendered, cancelled or forfeited in such manner as the directors of the company may find necessary, and if so surrendered, cancelled or forfeited, then the defendant shall be relieved of all further calls or assessments on the part of said company; but if it does not choose to surrender, cancel or forfeit its stock, but shall retain the same, then it shall assume and promise to meet all the obligations and duties of a shareholder in said company and shall enjoy all the benefits of a shareholder.

If the parties hereto shall not come to an agreement upon effort to compromise the further liability of the defendant, this action shall be subject to trial for the call of £1 5s., made on Oct. 4, 1895, without prejudice by reason of this agreement, neither shall the defendant's liability for further calls be in any way prejudiced thereby.

It is expressly understood by the parties hereto that this stipulation is entered into on the part of the plaintiff, by the attorneys of the plaintiff, without any authority to bind the plaintiff to compromise the defendant's further liability as a shareholder in plaintiff company, but on the part of the plaintiff's attorneys it is agreed that this agreement is entered into on their part in good faith and with the opinion that the plaintiff company will accept the same, and the plaintiff's attorneys further agree that they will recommend this settlement in the manner as herein stated, and have no reason to doubt the willingness of the plaintiff to so settle, and said attorneys will use their best efforts to have the plaintiff carry out this agreement.

It is further agreed on the part of the plaintiff that this agreement shall bind the plaintiff absolutely to the extent of the payment made and the adjournment of the action pending the effort to make a compromise, and that the payment made, the making of this stipulation, and the effort to carry out the same shall not in any way prejudice the rights of the defendant as to any defence he may urge to the payment of any call made after June 10, 1894.

11 In witness whereof, we have set our hands to this agreement in triplicate at Concord, N. H., on this twentieth day of October, A. D. 1897.

NASHUA SAV. BANK,
By its attorneys, J. S. H. FRINK,
A. T. BATCHELDER,
HIRAM BLAKE,
C. J. HAMBLETT.
THE ANGLO-AMERICAN LAND MORTGAGE & AGENCY CO.,
By GILBERT A. DAVIS, *Attorney.*
POWELL & DAMRON, *Attorneys.*

On the back of which said stipulation *is* the following endorsements:

Received of The Nashua Savings Bank, defendant, $6,059.58 in full of the call of July 10, 1894, and interest and costs of this action to this date in accordance to within contract.

Dated, Concord, N. H. Oct. 20/97.

POWELL & DAMRON,
Att'ys for Pl'ff.

This action was thence continued to the May term, A. D. 1898, of this court, when, on, to wit, the twenty-seventh day of June, A. D. 1898, a jury of twelve men, duly qualified, was empanelled and sworn to try the issues according to the law and the evidence. And on the twenty-eighth day of June, 1898, the plaintiff files the following amendment to the declaration:—

Amendment to Third Count of Declaration.

(Filed June 28, 1898.)

And now comes the said plaintiff and asks leave to amend the third count of the declaration in said cause by inserting in the eleventh line (the tenth line in this transcript) after the words "subscription to" the words "and ownership of."

By its attorney, GILBERT A. DAVIS.

12 Ordered by the court that the said amendment be allowed, and it is made this twenty-eighth day of June, A. D. 1898.

Attest: FREMONT E. SHURTLEFF, *Clerk.*

And thereafter, to wit, on the thirtieth day of June, A. D. 1898, on motion of the plaintiff, the court directed a verdict for the plaintiff, and thereupon, on said thirtieth day of June, the jury brought in the following verdict:—

Verdict.

June 30, 1898.

The jury find that the defendant did promise the plaintiff, in manner and form as alleged by the plaintiff, and assess the plaintiff's damages at six thousand eight hundred fifty-eight dollars and sixty-seven cents.

RUFUS E. TUTTLE, *Foreman.*

It was thereupon, on said thirtieth day of June, ordered by the court that the defendant file its bill of exceptions by the first day of August, A. D. 1898, and the plaintiff its corrections by the fifteenth day of August, 1898, exceptions to be allowed after adjournment of term with the same effect as before adjournment.

Thereafter, on, to wit, the twenty-fifth day of July, A. D. 1898, upon motion of the defendant the time for filing bill of exceptions was extended to the fourth day of August, A. D. 1898, and the time for filing corrections was extended to the nineteenth day of August, A. D. 1898. And thereafter on, to wit, the fourth day of August, A. D. 1898, the defendant filed its draft bill of exceptions and on the eighteenth day of August, A. D. 1898, the plaintiff filed its corrections thereto.

This cause was thence continued to the August term, A. D. 1898, when, to wit, on the fifth day of October, A. D. 1898, the defendant filed corrected bill of exceptions.

The cause was thence continued to the present term, when, to wit, on the twenty-ninth day of October, A. D. 1898, the court allowed the defendant's bill of exceptions, which bill of exceptions as allowed is as follows:

13 *Defendant's Bill of Exceptions.*

(Allowed October 29, 1898.)

This is an action of assumpsit originally brought in this court. The plaintiff is an alien and a citizen of England, and the defendant is a corporation established under the laws of New Hampshire, having its principal place of business in Nashua, in said State, and a citizen of said State.

The count in the declaration upon which the trial proceeded, as amended, is as follows:—

"In a plea of the case for that the said defendant heretofore, to wit, on the second day of December, A. D. 1895, at said London, to wit, at Nashua, in the State of New Hampshire, in the United States of America, was further indebted to the said plaintiff in a large sum of money, to wit, eight thousand dollars for a certain call and assessment made by said company in pursuance of its charter and by-laws, at said London, to wit, on the tenth day of July, A. D. 1895, and to be paid on the third day of December, A. D. 1895, upon the defendant's subscription to and ownership of a large number, to wit, one thousand shares at ten pounds sterling each, to wit, fifty dollars each of the capital stock of said company, which subscription had theretofore been made and subscribed in due form by said defendant, to wit, at said Nashua, and of the said assessment and call the said defendant had notice at Nashua, in the State of New Hampshire, heretofore, to wit, on the second day of December, A. D. 1895, and thereafter, to wit, at said Nashua, on the second day of December, A. D. 1895, in consideration thereof, the defendant then and there promised the plaintiff to pay said sums on demand with interest at the rate of seven per cent. per annum from the time the same became due and payable as aforesaid. Yet though often requested the defendant has never paid said several sums of money, or any of them, but has neglected and refused so to do."

At the trial before the jury begun on the twenty-seventh day of June, A. D. 1898, the plaintiff introduced the following evidence: Counsel for plaintiff offered certain entries in the books of the plaintiff company, to which counsel for defendant objected, saying:

Mr. Frink: "My objection is, they have not proved that we are a stockholder and either had implied or actual knowledge of the by-laws of the association."

14 The plaintiff then introduced the deposition of Mr. Frederick H. Ramsden, who was asked the following interrogatory:

"Int. 1. State your full name, residence, and occupation?

Ans. My full name is Frederick Herbert Ramsden; my age is twenty-six years and upwards; my business residence is No. 150 Leadenhall street in the city of London, England; I am a duly qualified solicitor of the supreme court of judicature in England (equivalent to attorney-at-law of the United States) practicing in the city of London, and as such solicitor I am thoroughly acquainted with the law of England. I am also secretary of the plaintiff company."

"Int. 42. State, if you know, what notice of such calls or assessments was given to said Nashua savings bank, and by what authority was such notice given, if any?"

His answer to that question was received without objection and is as follows:

"Ans. I was not secretary of the plaintiff company until shortly after the 1894 call was made. At that time Mr. J. F. Bennett was secretary of the company. The defendant Nashua Savings Bank's registered address is as shown by *Exhibit* 7 *hereto,* and they have never named a place of address within the United Kingdom as required by clause 139 of the articles of association (Exhibit 6 hereto), and notice as required by said articles of association of the 1895 call addressed to them by and in accordance with the clause 140 of the said Exhibit 6 hereto was, therefore, to my personal knowledge duly posted up and remained posted up in a conspicuous place in the registered office of the company for more than a month before the call was payable. In addition to the above, however, a printed notice of call was also forwarded to the defendant Nashua Savings

Bank and all other shareholders of the company who had likewise failed to give an address in accordance with clause 139 aforesaid, by a prepaid letter through the post directed to their registered address, which is in the United States. I have searched for but am unable now to find the original notice which was so posted up, but it was to the effect and in the words and figures of the writing which I now produce and hand to the commissioner to be annexed hereto as Exhibit 25. Similar notice of the 1894 call to the defendant Nashua Savings Bank and others which had been posted up under the articles of association by the former secretary continued, to my personal knowledge, to be posted up in a conspicuous place in the registered office of the company from the time I became secretary until after 1st September, 1894. I have searched for, but am unable now to find the original of such notice to the defendant Nashua Savings Bank, but it was to the effect and in the words and figures of the writing which I now produce and hand to the commissioner to be annexed hereto and marked 'Exhibit No. 26.'"

15 The next question in the said deposition was as follows:

"Int. 45, State whether or not the amount of said calls or assessments, if any, has ever been paid to the plaintiff company by said Nashua savings bank, or by any one in its behalf, or by any previous owner of such shares?"

Mr. Frink. "We object to the answer, as it does not appear to be of his own personal knowledge. He is not the treasurer."

The Court. "It does not appear it was not. Was objection made to the question?"

Mr. Powell. "No."

The Court. "That will have to be read then. I shall have to submit it to the jury, and they will determine whether he has answered from his own knowledge. Of course I will instruct the jury, if it becomes necessary, that they cannot regard it, unless they are satisfied, from all the facts in the case, it is within his own knowledge. I will also say that I look upon this as entirely a matter of defence—whether the assessments have been paid or not."

Mr. Frink. "We except to the admission of this answer, because it does not appear that the deponent has any personal knowledge as to whether the assessments were paid or not, and because it does not appear that he occupied any official position from which he could have derived knowledge."

The Court. "The exception is saved."

"Ans. The amount paid on the 1,000 shares standing in the name of the Nashua savings bank is £2 per share. James L. Lombard paid the first 1£ per share on the said shares before they were transferred by him to the defendant Nashua Savings Bank. In 1885 a call of a further £1 per share was made payable by two instalments on the 1st of October and 1st December, 1885, and the Nashua savings bank paid the company on the 28th of September, 1885, £500, and on the 4th December, 1885, £500, in respect of the said instalments of the said call on the said 1,000 shares held by them. No other payment in respect of calls on the said shares has been made by the said Nashua savings bank or by any one on its behalf or by any previous owner of the said shares."

The plaintiff offered in evidence the statutes of England, which they claimed were authenticated by the deposition of Mr. Ramsden, and the defendant objected to the introduction of said statutes on the ground of defective authentication of the laws of a foreign state. The testimony of Mr. Ramsden as to his qualifications bearing upon this subject is as follows:

"Int. 1. State your full name, age, residence and occupation.

Ans. My full name is Hildebrand Ramsden; my age is sixty years and upwards, and I reside at 26 Upper Bedford place, London,
16 England. In 1862 I was admitted as attorney-at-law of Her Majesty's courts of Queen's Bench, common pleas and exchequer, and solicitor of the high court of chancery in England, such attorneys and solicitors being since the judicature act, 1873, designated solicitors of Her Majesty's supreme court of judicature in England. I am practicing and have practiced as such attorney and solicitor for the last thirty years and upwards, at 150 Leadenhall street, in the city of London. I have a large practice in and am intimately acquainted with English company or corporation law. I graduated as a master of arts of the University of Cambridge in England, before I was admitted as attorney and solicitor. I am also a commissioner of oaths. I am also managing director for the plaintiff company."

"Int. 5. What kind of an association or body is the plaintiff, The Anglo-American Land Mortgage and Agency Company, Limited, when was it organized and under what laws, and what number of shares had been subscribed at the date of its organization?

Ans. The plaintiff company, The Anglo-American Land Mortgage and Agency Company, Limited, is a corporation formed with limited liability under the companies' acts, 1862–1880. These acts are (as appears by 43 Vict. cap. 19, sect. 2) 25 and 26 Vict. cap. 89—'An act for the incorporation, regulation and winding up of trading companies and other associations,' and the following amending acts, viz.: 30 and 31 Vict. cap. 131, 'An act to amend the companies' acts, 1862;' 40 and 41 Vict. cap, 26, 'An act to amend the companies' act, 1862 and 1867;' 42 and 43 Vict. cap. 76, 'An act to amend the law with respect to the liability of members of banking and other joint stock companies and for other purposes;' 43 Vict. cap. 19, 'An act to amend the companies' act, 1862, 1867, 1877 and 1879.' I produce copies of these five acts and hand same to the commissioner to be annexed hereto as Exhibits 57, 58, 59, 60 and 61. These copies are issued by authority, being printed by Her Majesty's printer and are as such by law receivable in evidence without further proof.

The COURT: What is your purpose in offering this proof of the statutes of Great Britain?

Mr. POWELL: The purpose of offering the proof is to show that we have a right of incorporation and are incorporated, and the other reason is, that the foreign statutes prescribe the liability and the rights of stockholders.

The COURT: The plaintiff offers to prove, as I understand, the existence of the corporation, and the first step is an offer of the statutes of Great Britain by virtue of which he says this plaintiff corporation was organized. Under the general rules of law as commonly understood, a statute of Great Britain can be proved only under the great seal—or by copy under the great seal—or by copy sworn to have been compared with the enrolled statute, or by a
17 sworn certificate by some officer duly authorized to give copies. The plaintiff has neither of these here. But he has the deposition of Mr. Ramsden, who swears he is a solicitor of the supreme court of judicature of England, and he has produced what he says are copies of certain statutes of Great Britain, which are attached to his depositions as copies and marked exhibits. Now the case of *Hall v. Costello*, 48 N. H. 176, has relaxed that strict rule, as to the method of proving the statutes of foreign countries, and permitted them to be proven by a copy, not duly authenticated, in connection with the testimony of an attorney-at-law in the State of New Hampshire, who testified he had made himself familiar with the laws of Canada. I think, under that decision, I must finally leave it to the jury to determine whether Ramsden was sufficiently qualified, as a matter of fact, to understand what the written laws of Great Britain were. That is a question of fact, which I can dispose of only in this preliminary way. It will be for the jury to finally determine whether they find anything in the record to satisfy them that Mr. Ramsden is sufficiently familiar with the laws of Great Britain, or was of sufficient experience to satisfy them that what he has produced here are the laws of Great Britain. Therefore, without ruling upon the question, whether or not, under the laws of New Hampshire, the defendant can raise a question of the existence of this corporation under the pleadings as they stand, for the purpose of enabling the plaintiff to prove, as a fact, the existence of a corporation, and the other purpose stated by the plaintiff, I allow him to introduce these statutes."

To the above ruling of the court, admitting the statutes of Great Britain, the defendant duly and seasonably excepted, on the ground that the statutes of Great Britain offered are not proved according to the established rules of law, and because they are not proved or authenticated under the great seal of Great Britain, or by a person under oath who has compared them, or by a certificate of an officer who has been authorized to make such a certificate.

Thereupon the plaintiff, subject to the exception of the defendant, introduced the following statutes of Great Britain:

25 and 26 Victoriæ, cap. 89.

"An act for the incorporotion, regulation and winding up of trading companies and other associations.

6. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company with or without limited liability.

7. The liability of the members of a company formed under this act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.

8. Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things; (that is to say,)

(1.) The name of the proposed company with the addition of the word 'Limited' as the last word in such name:

(2.) The part of the United Kingdom, whether England, Scotland or Ireland, in which the registered office of the company is proposed to be situate:

(3.) The objects for which the proposed company is to be established:

(4.) A declaration that the liability of the members is limited.

(5.) The amount of the capital with which the company proposes to be registered divided into shares of a certain fixed amount subject to the following regulations:

(1.) That no subscriber shall take less than one share.

(2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

12. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association.

16. The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of, and be attested by one witness at least, and such attestation shall be a sufficient attestation in Scotland, as well as in England and Ireland. When registered they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors and administrators to conform to all the regulations contained in such articles, subject to the provisions of this act; and all monies payable by any member to the company, in pursuance of the conditions and regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.

19 50. Subject to the provisions of this act, and to the conditions contained in the memorandum of association, any company formed under this act may, in general meeting from time to time by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association or in the table marked 'A' in the first schedule where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

51. A resolution passed by a company under this act shall be deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy, at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed: at any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favor of or against the same. Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company. In computing the majority under this section, when a poll is demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company.

67. Every company under this act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers to be duly entered in books to be from time to time provided for the purpose, and any such minutes as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting shall be received as evidence in all legal proceedings; and until the contrary is proved, every
20 general meeting of the company or meeting of the directors
or managers in respect of the proceedings of which minutes
have been so made, shall be deemed to be duly held and convened

and all resolutions passed thereat or proceedings had, to have been duly passed and had, and all appointments of directors, managers or liquidators shall be deemed to be valid, and all acts done by such directors, managers or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications."

Also memorandum of association as follows, was read in evidence:

"The companies acts 1862 to 1880.

Company limited by shares.

Memorandum of Association of the Anglo-American Land Mortgage and Agency Company, Limited.

First. The name of the company is "The Anglo-American Land Mortgage and Agency Company, Limited."

Second. The registered office of the company is to be situated in England.

Third. The objects for which the company is established are:

(*a.*) The investment or advancement of money on loan on the security by first mortgage of or first charges or liens on lands, hereditaments, and real or heritable estate of all and any description and tenures, situated in the United States of America or Canada, either with or without collateral or other security, and either by original loan or by the acquisition of or advances upon existing first-mortgage charges or liens.

(*b.*) The selling and disposition of the mortgages and securities above mentioned, either with or without the guarantee of the company for the payment of the principal or interest thereof, or any part thereof.

(*c.*) The receiving of money on deposit, and the borrowing of money for the purposes of such investment and the issuing to the lenders of such money, of bonds, debentures, debenture stock certificates, deposit notes or receipts, or other securities of the company, either based upon all or any of the mortgages or securities of the company or otherwise, and transferable or otherwise: the mortgaging, allocating, setting apart, or depositing any of the said mortgages or securities of the company either with or without constituting a special trust of the same for the purposes of such borrowing: and the redemption and repurchase of such bonds, debentures and securities.

21 (*d.*) The exercise of all the powers of mortgages, including the power of acquiring the absolute ownership or power of disposition over the mortgaged premises, and the improvement thereof for purposes of sale, mortgage or other disposition.

(*e.*) The effecting for its own account, or for that of other parties, all operations of exchange.

(*f.*) The acting as agents, or otherwise, for the negotiations and carrying into effect of sales of land and the American and Canadian securities, on commission or otherwise.

(*g.*) The acting as agents, or otherwise, for the investment, payment, transfer or collection of money, coupons or other pecuniary interests.

(*h.*) The undertaking, either alone or in conjunction with other parties, loans to any State, county, municipality, railway company, or other public or private association; the tendering for such loans for account of othes parties and the negotiation of bonds and loans upon commission.

(*i.*) The making and carrying out any arrangement for uniting or amalgamating, either in whole or in part, the business of the company with that of any other company, corporation, firm or individual engaged in carrying on any business of a nature similar to that or any of those of the company, and for purchasing any such business.

(*j.*) The establishing and regulating agencies for carrying out the objects hereinbefore mentioned.

(*k.*) The making, accepting or indorsement of promissory notes, bills of exchange and other negotiable instruments.

(*l.*) The doing of such other things, both at home and abroad, including the obtaining of any corporate, executive or administrative power, as may be incidental to or expedient for the carrying out of the objects hereinbefore mentioned, or any of them; and also such additional or extended objects as the company may from time to time by special resolution determine and resolve.

Fourth. The liability of the members is limited.

Fifth. The nominal capital of the company is £500,000 divided into 50,000 shares of £10 each, of which the first issue shall be 25,000 shares, with power to increase such capital, and to issue all or any part of the original or increased capital at a premium or at a discount, and with such preference, priority or privilege as may be thought desirable.

We the several persons whose names, addresses and descriptions are subscribed are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite to our respective names:

22 *Names, Addresses, and Descriptions of Subscribers.*

	Number of shares taken by each subscriber.
Charles Fraser Mackintosh, M. P., 5 Clages street, London, W	One
David MacPherson, merchant, Cowper's court, 32 Cornhill, London, E. C	One
William Henry Richards, merchant, 36 Mark lane, E. C	One
James George Button Browning, gentleman, 51 Brook street, Grosvenor square	One
Hunter Stephenson, merchant, 26 Suffolk street, Pall Mall	One
Eben Walker Henry, insurance broker, Penn-garth, Croydon	One
James Frederick Bennett, secretary to Public Co., 90 Charlotte street, London	One

Dated the twenty-fifth day of October, 1882.

Witness to the above signatures,

EDMUND S. PARKER,
Solicitor's Clerk, 75 *Cornhill, London, E. C.*

No. 17465. C. N. L. 16,900.

Certificate of Incorporation of the Anglo-American Land Mortgage and Agency Company, Limited.

I hereby certify that the Anglo-American Land Mortgage and Agency Company, Limited, is this day incorporated under the companies' acts, 1862 to 1880, and that this company is limited.

Given under my hand, at London, this twenty-first day of October, one thousand eight hundred and eighty-two.

W. H. COUSINS,
Registrar of Joint Stock Companies.

Fee, £48 :15 :0.

Also articles of association of the alleged plaintiff corporation as follows, were read:

1. The regulations contained in the table marked "A" in the first schedule to the companies' act, 1862, shall not apply to this company, which shall be governed by the following regulations.

2. The offices of the company shall be at No. 1 Queen Victoria street, in the city of London, or at such other place in London, or Middlesex, as the directors may from time to time appoint, and with branch offices or agencies also, as the directors may from time to time appoint.

23 3. Every person who has accepted any share or shares in this company, and whose name is entered in the register of members, and no other person, shall be deemed to be a member.

14. The deed of transfer shall be in the usual common form, and be presented to the company accompanied with such evidence as the directors may require to prove the title of the transferror, and thereupon the company shall register the transferee as a member.

9. Every member shall be entitled to a certificate under the common seal of the company, specifying the share or shares held by him and the amount paid up thereon, and if such certificate be worn, damaged or lost, it may be renewed, if the board think fit, on the payment of 1s.

73. The business of the company shall be managed by the directors, subject to the control of the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

74. The directors may commence and prosecute the business and objects of the company, notwithstanding that the whole of the shares have not been issued or taken up.

81. The directors shall be invested with general authority to exercise all such powers of the company as are not by the companies' acts 1862 to 1880 or by the regulations in these articles contained, declared to be exercisable only by the company in general meeting.

88. The directors shall cause minutes to be made in books provided for the purpose:

1. Of all appointments of officers made by the directors.

2. Of the names of the directors present at each meeting of directors and committees of directors.

3. Of all orders made by the directors and committees of directors, and

4. Of all resolutions and proceedings of meetings of the company and of the directors and committees of directors.

And any such minute as aforesaid, if signed by any person purporting to be the chairman of any meeting of the company, or of the directors or committee of directors, shall be receivable in evidence, without any further proof.

107. The secretary shall, under the direction of the board, have charge of the books and accounts of the company, conduct the correspondence on its behalf, and perform such other duties as may from time to time be required by the directors, or be incidental to the office of secretary.

118. The board may, if they deem it desirable in the interest of the company, and for the more convenient conduct of its operations, appoint one of their number to specially superintend the business of the company, either as chairman or managing director, and either for a fixed term or without limitation as to the period for
24 which he is to hold such office, and at such remuneration (in addition to his ordinary remuneration as director of the company) as they see fit, and may from time to time remove him from such office, and appoint another in his place.

138. All members resident out of the United Kingdom shall be required to name a place of address in the United Kingdom at which the notices of the company may be served; and the service of any notice of the company at such place of address shall be sufficient notice to such member.

139. If any member resident out of the United Kingdom neglect to give such address as is hereinbefore required, notices for him may be posted up in a conspicuous place in the registered office of the company, and for all the purposes of these regulations the registered office of the company shall be deemed to be the registered place of abode of such member.

140. Any notice requiring authentication by the company may be signed by the director, secretary or other officer of the company in that behalf authorized by the directors, and need not be under the common seal of the company.

141. Notice by letter shall be posted in such time as to admit of the letter being delivered in the due course of delivery within the period (if any) prescribed for the giving of such notice and in proving such service, it shall be sufficient to prove that such notice was properly directed and that it was put into the post-office at such time as aforesaid.

The amended articles of association of the alleged plaintiff corporation were read as follows:

9. The directors may from time to time make such calls as they think fit upon the members in respect of all monies unpaid on their shares, and each member shall pay the amount of every call so

made on him to the persons, and at the times and places appointed by the directors. A call may be made payable by instalments.

10. A call shall be deemed to have been made at the time when the resolution authorizing such call was passed.

11. One month's notice of any call shall be given specifying the time and place ot payment, and to whom such call shall be paid.

12. If before or on the day appointed for payment any member do not pay the amount of any call to which he is liable, such member shall, unless the directors otherwise determine, be liable to pay interest for the same at the rate of £7 per cent. per annum from the day appointed for the payment thereof to the time of actual payment; and he shall not be entitled to interest on the calls paid while any call is overdue and unpaid.

36. The ordinary general meeting of the company shall be held annually in the month of August in each year, or within twenty days thereafter, at such place in London as the directors may determine.

25 67. The number of directors shall not be less than three nor more than ten.

69. Each director, except the debenture holders' directors, shall hold fifty shares at least in the company, and the office of director shall be vacated:

a. If he cease to hold in his own right at least fifty shares.

b. If he holds any other office or place of profit under the company except that of managing director.

c. If he absents himself from the meetings of the board as hereinafter provided.

d. If he be adjudged bankrupt, or suffer his estate to become vested in any person for the benefit of his creditors, or compounds with his creditors, or suspends payment.

e. If he is individually concerned in or participates in the profits of the company.

f. If he participates in the profits of any work done for the company.

But the above rules shall be subject to the following exceptions:

That no director shall vacate his office by reason of his being a member of or shareholder in any firm or company which has entered into contracts with or done any works for the company; nevertheless he shall not vote in respect of such contract work, and if he does so vote his vote shall not be counted, and he shall incur a penalty not exceeding twenty pounds.

80. The management of the business and the control of the company shall be vested in the directors, who in addition to the powers and authorities by these presents expressly conferred on them may exercise all such powers, and do all such acts and things as may be exercised or done by the company, and are not hereby or by statute expressly directed or required to be done by the company in general meeting, but subject nevertheless to any regulations from time to time made by the company in general meeting; but no regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

82. The directors may exercise on behalf of the company all, any and every of the powers conferred by "the companies' seals act 1864."

87. The directors shall have authority to enact by-laws for the regulation of the business of the company, provided the same are in accordance with the companies' acts 1862 to 1890, and with the regulations in these articles contained.

139. All members resident out of the United Kingdom shall be required to name a place of address in the United Kingdom at which the notice of the company may be served; and the service of any notice of the company at such place of address shall be sufficient notice to such member.

26 And the certificate of stock, produced in open court by counsel for defendant at the request of counsel for plaintiff, which was as follows, was read:

No. 224. Number of shares, 1,000.

Share Certificate.

The Anglo-American Land Mortgage and Agency Company, Limited.

This is to certify that the Nashua Savings Bank of Nashua, New Hampshire, U. S. A., is the proprietor of one thousand shares of £10 each, numbered 9546 to 10,545, inclusive, in the capital stock of the Anglo-American Land Mortgage and Agency Company, Limited, subject to the articles of association and the rules and regulations of the company, and that up to this day there has been paid up in respect of each of such shares the sum of one pound.

Given under the common seal of said company the fifteenth day of November, 1883.

W. H. RICHARDS,
I. G. BUTTON-BROWNING, *Directors.*
N. BENNETT, *Secretary.*

NOTE.—No transfer of the shares represented by this certificate can be registered until such transfer and certificate have been deposited in the company's office.

And on the back of such said certificate of stock is the following endorsement:

LONDON, 15*th December*, 1892.

A further sum of one pound (£1) per share has been paid on these shares, making two pounds (£2) per share in all.

N. BENNETT, *Manager.*

The plaintiff introduced no evidence whatever that the plaintiff corporation was insolvent at the time of the making of the calls or assessments sued upon, or at the time of the bringing of this suit, or that the call or assessment was made for the benefit of its creditors, or in payment of its debts. No promise, express or implied, to pay such assessments was proven, other than that arising from the acceptance and retention of the certificate of stock by defendant, and from the articles of association, and rules and regulations referred to in said certificate of stock, and the statutes of Great Britain.

27 The plaintiff read, without objection, the following question and answer, upon cross-examination, from the deposition of Frederick H. Ramsden :—

Int. 1. State, if you know, when the plaintiff company was organized ?

Ans. The plaintiff company was organized or incorporated on 31st October, 1882.

The statutes, memorandum and articles of association, certificate of stock, and Frederick H. Ramsden's testimony constitute all the evidence bearing upon the question of plaintiff's incorporation and organization.

The plaintiff offered the following from the amended articles of *of* association of plaintiff corporation :

140. If any member resident out of the United Kingdom neglect to give such address as is here-before required, notices for him may be posted up in a conspicuous place in the registered office of the company : and for all the purposes of these regulations the registered office of the company shall be deemed to be the registered place of abode of such member.

To the reading of the foregoing article, the defendant duly and seasonably excepted, on the ground that it made a distinction between resident and foreign stockholders and is invalid for that reason.

The plaintiff, after reading section 25 of the companies' act of 1862, laws of Great Britain, as follows :

25. Every company under this act shall cause to be kept in one or more books a register of its members, and there shall be entered therein the following particulars:

1. The names and addresses, and the occupations, if any, of the members of the company, with the addition, in case of a company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number :

And of the amount paid or agreed to be considered as paid on the shares of each member:

2. The date at which the name of any person was entered in the register as a member.

3. The date at which any person ceased to be a member; and any company acting in contravention of this section shall incur a penalty not exceeding five pounds for every day during which its default in complying with the provisions of this section continues, and every director or manager of the company who shall knowingly and wilfully authorize or permit such contravention shall incur the like penalty.

28 Plaintiff offered in evidence a duly attested copy of an extract from the plaintiff's book, called a register of members, filed with the clerk of this court, and notice given as required by rule 14. No objection is made as to the same not being a copy, except that the defendant claims that it was not a full copy of the

records, but only a copy of defendant's account from the plaintiff company's book called the register of members. Said extract was offered for the purpose of showing the plaintiff had duly complied with the laws of England directing a registry of shareholders, so far as the Nashua savings bank was concerned, and that the Nashua savings bank was a registered shareholder and for no other purpose. Objection to the admission of this evidence was made by the defendant, and subject to exception the evidence was submitted by the court as follows:

Mr. Frink: We object to it in the first place, because it is simply an extract from what otherwise appears to be an entire record. It is simply a mutilation, as I may say, of the entire record. In the next place, it is simply a declaration in their own favor without knowledge being brought home to this defendant that there was any such thing appearing upon their books; and again that it would appear that there may have been a registry of all the shareholders in the company appearing upon the books, and this is but a partial extract from that record, and not a complete extract from the record.

The Court: I will rule that, if the entire record were here, I should not allow anything read except this. This appears to be the entire record relating to this defendant. I will admit it for the purpose stated only. Exception may be saved.

To this ruling the defendant duly and seasonably excepted on the grounds stated above. The extract of the register of members, offered and excepted to as above, is as follows:

164. Nashua Savings Bank, Nashua, New Hampshire.

Shares registered and purchased.						Capital paid.			
Date.	Register. No.	Transfer. No.	No. of shares.	Distinctive from.	Numbers. No.	Date.	No. of shares.	Per shares.	Amount.
1883. Oct. 18	....	5	1,000	9,546	10,545	1883. Oct. 18	1,000	20%	1,000
						1885 Oct. 30	......	10%	500
						153 Dec. —	....	10%	500
						177			2,000

29 I, Frederick Herbert Ramsden, secretary of the Anglo-American Land Mortgage and Agency Company, Limited, do hereby certify that the foregoing is a true and complete extract from the original records of the company.

In further testimony whereof the seal of the company has by order of the board been affixed hereto this tenth day of December, 1895.

F. H. RAMSDEN, *Secretary*. [L. S.]

Attest: H. RAMSDEN.

——— ———,
——— ———,
Directors.

After the above paper was read in evidence, the court said to the jury:

You understand, gentlemen of the jury, that does not relieve the plaintiff from proving the defendant was a shareholder and liable for this assessment. It only shows that the plaintiff has complied with the law, assuming the bank was a shareholder. That is all.

After the plaintiff rested its case defendant read articles 14, 15, 16, 17, 18, 19 and 20 of the articles of association of the plaintiff company, which articles of association had been introduced in evidence by plaintiff, the sections read being as follows:

14. The company shall always have a paramount lien on the shares not fully paid of each member, and on the interest or dividend declared or payable in respect thereof for securing to the company the payment or performance of all his debts, liabilities and engagements to or with the company, whether contracted alone or jointly with any other person, whether a member or not, and such lien shall attach to shares in the hands of the executors or administrators of a deceased member, and the company may enforce such lien by sale or forfeiture of the shares on which the same may attach or any part of them.

15. If any member fail to pay any call due on the appointed day the company may, at any time thereafter during such time as the calls remain unpaid, serve a notice on him requiring him to pay such call, together with the interest which may have accrued by such non-payment.

16. The notice shall name a day and place or places on and at which such call, with interest, is to be paid. It shall also state that in the event of non-payment at the time and place appointed, the share or shares in respect of which such call was made will be liable to forfeiture, reserving, however, the company's right to sue for such calls.

17. If the requisitions of any such notice as aforesaid be
30 not complied with, any share or shares in respect of which
such notice has been given may be forfeited by a resolution of the directors to that effect.

18. Any share or shares so forfeited shall be deemed to be the property of the company, and may be disposed of in such manner as the company think fit.

19. Any member whose shares have been forfeited shall, notwithstanding, be liable to pay to the company all calls owing upon such shares at the time of the forfeiture, with interest.

20. If all calls, interest and expenses due in respect of any forfeited shares are paid before such shares have been disposed of to-

gether with such legal expenses as may have been incurred by the company in respect of such non-payment as aforesaid, whether judicial or extrajudicial, the forfeiture may be remitted by the directors at their discretion: and if the forfeiture be so remitted, such shares shall then revert to the person entitled thereto previously to the forfeiture and be held by him thereafter, in the same manner as if no such forfeiture has taken place.

At the close of all the evidence in the case, and before the court charged the jury, the defendant moved that the court direct a verdict for the defendant on the pleadings and evidence in the case, for the reasons hereafter specifically stated.

Because (1) the declaration sets up an action in case, when it should have been in debt.

Because (2) the plaintiff is an alien corporation and the declaration contains no averment or allegation as to the law of Great Britain under which it is claimed said corporation was organized.

Because (3) the declaration contains no averment or allegation of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

Because (4) the declaration contains no averment or allegation that said call or assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

Because (5) the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

Because (6) the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

31 Because (7) the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of defendant.

Because (8) the declaration contains no averment or allegation of the conditions or terms of the defendant's subscription to the stock of the plaintiff.

Because (9) the declaration contains no direct averment or allegation that the defendant was a stockholder in said company at the time said call or assessment was made.

Because (10) there was no evidence in the case of an express promise on the part of the defendant to pay such call or assessment.

Because (11) there was no evidence in the case that this suit was instituted or carried on for the benefit of the creditors of the plaintiff, or that this call or assment was made for the payment of debts or other obligations of the plaintiff; and because the evidence tended to show that the plaintiff was not insolvent at the time of making the call or assessment or at the time of the institution of this suit.

Because (12) this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation, or in payment of its debts.

Because (13) this remedy, under a statute of England and Great Britain, if enforcible at all, should be in debt.

The court refused to direct a verdict for any of the reasons stated, to which refusal the defendant seasonably excepted.

The court in charging the jury said in part as follows:

"Now, under the decisions of the Supreme Court of the United States it would be sufficient to show that this plaintiff corporation is a corporation *de facto*, and, under the same decisions, the retention by the defendant of the certificate of stock for a number of years, produced at the trial by the defendant upon request of the plaintiff, might operate as an estoppel to prevent the defendant from denying that the plaintiff is a corporation, at least, a corporation *de facto*. However, it is not necessary to pass on that question, because I am sure that the plaintiff has proven the issue in its favor so
32 clearly that I would not be authorized to submit it to the jury; and I am required, under the rule which prevails in this court, not to allow an issue to go to the jury when it is plain the court must set aside the finding of the jury, if in a certain direction. It is plain that under that practice I am required to pass on this question, although to a certain extent, it involves what may technically be called a question of fact.

* * * * * * *

Now, considering these statutes proved by the testimony of Ramsden, there is no doubt that the proceedings under the statutes which have been exhibited by the plaintiff here, constituted a corporation as alleged by the plaintiff, not only *de facto* but *de jure*. Nothing whatever has been pointed out to indicate that the statutes of Great Britain were not in all respects strictly complied with. Therefore that issue I find for the plaintiff."

To this ruling of the court, that the plaintiff sufficiently showed it was a corporation *de facto*, the defendant duly excepted as being against the law and the evidence.

The court in its charge to the jury said in part as follows, as hereinbefore recited:

"Now, under the decisions of the Supreme Court of the United States, it would be sufficient to show that this plaintiff corporation is a corporation *de facto*, and, under the same decisions, the retention by the defendant of the certificate of stock for a number of years produced at the trial by the defendant upon request of the plaintiff, might operate as an estoppel to prevent the defendant from denying that the plaintiff is a corporation—at least, a corporation *de facto*."

To this ruling of the court, that the retention of the certificate of stock produced by the defendant at the trial might operate as an estoppel, the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows:

"In meeting this issue, we first have to deal with the testimony of Ramsden, who, in the answer to the first question put to him, states

that he is an English solicitor, and that he is very fully acquainted with the laws of Great Britain. His answer I need not read; it is in the record. This testimony of Ramsden not having been met or qualified or put in issue by anything which further appeared in the case, there is no doubt that I am not required to submit to the jury whether or not he is competent to give evidence of the kind which he has given. There is no doubt that, if the jury should find
33 that he is not competent, I should be compelled to set aside the finding. He is clearly inside of the practical rule applied in *Hall v. Costello*, 48 N. H. 176. So, as already said, I would not be justified in submitting the issue to the jury under these circumstances. I am not compelled to find that he is competent as a barrister would be competent, or that he is competent to testify to the unwritten law of England; but I do find he can testify to the extent he has testified,—that is to say, that he is competent to testify that the printed statutes he has produced are laws of Great Britain, — at least until there is some evidence to meet his testimony or qualify it in some way. I think I am fully within the rule in that particular laid down by the supreme court of this State in *Hall v. Costello*, already referred to, and which on this question, it being a question of the introduction of evidence as a mere matter of proceeding and as a mere rule of practice, controls me, although except for that decision I should be compelled to find that the statutes of Great Britain could not be proved in the way the plaintiff has undertaken to prove them."

To the foregoing ruling of the court, that the statutes of Great Britain had been duly proved, the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows:

"The next question in logical order is as to the law of the place which governs the relations of the parties to the alleged implied or expressed contract upon which the suit is brought. The cases to which I refer, namely, *Canada Southern R. R. v. Gebhard*, 109 U. S. 537, and *Hawkins v. Glenn*, 131 U. S. 329, leave this question in no doubt whatever, even if I had any doubt independently of them. The most striking illustration of this rule is *Relfe v. Rundle*, 103 U. S. 222, 226, wherein, among other things, it was said: 'Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence.' The *habitat* of the plaintiff corporation is London, and the parties, by their own free act, have submitted themselves to the laws of Great Britain with reference to their mutual relations, and to all the acts of the corporation done at its domicile which are consistent with those laws. Therefore, I must be governed by the laws of Great Britain, so far as they are shown in the case, and, so far as they are not shown in the case, I must presume them to be the fundamental principles of the common law, with reference to which the Federal courts are govered by their own rules, and do not accept the decisions of the local courts, except so far as those decisions approve themselves to their judgment. In other words, to state the matter accurately, in so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that

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they are the same as the laws of New Hampshire, where this 4 court is sitting; but as to the laws of New Hampshire, with reference to a question of a general character, we are not ontrolled by the decisions of the courts of New Hampshire, except s they commend themselves to our own judgment. Decisions of ie courts are, at the most, only evidence of what the law is, and, hen decisions are so conflicting as they now are, they are somemes very slight evidence."

To this ruling of the court, as to the law of the place which gov-rns the relations of the parties in this suit, the defendant duly and easonably excepted.

In charging the jury the court said in part as follows, as hereinefore recited :—

"In so far as the laws of Great Britain are not proved, I am unoubtedly bound to assume that they are the same as the laws of 'ew Hampshire, where this court is sitting."

To this ruling of the court, that, so far as the laws of Great Britain re not proved, they must be assumed the same as the laws of New Iampshire, the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows:

"The *habitat* of the plaintiff corporation is London, and the parties, y their own free acts have submitted themselves to the laws of reat Britain with reference to their mutual relations and to all the cts of the corporation done at its domicile which are consistent ith those laws. Therefore, I must be governed by the laws of reat Britain, so far as they are shown in the case; and, so far as ey are not shown in the case, I must presume them to be the fundaiental principles of the common law, with reference to which the 'ederal courts are governed by their own rules and do not accept ie decisions of the local courts except so far as those decisions pproved themselves to their judgment. In other words, to state ie matter accurately: in so far as the laws of Great Britain are not rove-, I am undoubtedly bound to assume that they are the same s the laws of New Hampshire, where this court is sitting; but, as the laws of New Hampshire, with reference to a question of a eneral character, we are not controlled by the decisions of the urts of New Hampshire, except as they commend themselves to ur own judgment. Decisions of the courts are, at the most, only vidence of what the law is; and, when decisions are so conflicting as they now are, they are sometimes very slight evidence."

5 To this ruling of the court, that it must presume, in the absence of proof of the laws of England, such laws to be the indamental principles of the common law, and the Federal courts o not accept the decisions of local courts, except so far as those deisions approve themselves to their judgment, the defendant duly nd seasonably excepted.

The court, in charging the jury, said in part as follows:

"We have left, then, the decisions of the three courts in Maine, lew Hampshire and Massachusetts, and in these three States it iust be conceded by the plaintiff that the law is settled beyond all oubt,—without undertaking to distinguish the peculiar facts in each case,—it is the settled law, so far as the courts can settle it, that this action could not be maintained except for an expression in the statutes of Great Britain, to which I will call attention later, and which expression would, perhaps, be sufficient to save it. Those decisions are declared in Cook on Stockholders, 3d ed. sec. 71, and Morawetz, 3d ed. sec. 128, and sequence, to be contrary to the great weight of authority, and I have no doubt they are so, and are contrary to principle. They seem to have grown out of some early decisions in Massachusetts, the precise nature of which I have not had time to investigate, and have not found it necessary to investigate. I think that, possibly, in these early decisions, too much weight was given to the provision of the statutes which were enacted in all three States, providing for the forfeiture and sale of stock for unpaid assessments. However, it is clear in my mind, that this doctrine is contrary to the ordinary principle of law.

* * * * * * *

Now as to the statutes of Great Britain, which under the circumstances, and under the authorities I have referred to, govern the contract between the parties, section 16 of the companies' act, Exhibit 1, provides that,

'All moneys payable by any member of the company, in pursuance to the conditions or regulations of the company, or any such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.'

* * * * * * *

The fact that this provision of the statutes to which I have referred existed, and that there are also in the same statutes certain provisions for the forfeiture of stock in case of non-payment or assessments, sets aside this case entirely from all those where the courts have been inclined to hold that the granting of a right to forfeit and sell stock is by implication exclusive. That is to say, there
36 is a class of cases where the courts justly hold that, even if at
common law there would be an implied promise to pay, yet, where the statute provides forfeiture and sale, that remedy is exclusive. But when the statute provides both forfeiture and sale, and that the assessment when called for shall stand as a debt—when the two are found in the same statute, the correct rules of construction, they should both be considered as concurrent remedies; although the court would also be compelled to hold that, if the parties plaintiff elected to proceed by forfeiture and sale, they could not afterwards proceed by an action, or, if by action, that they could not afterwards proceed by forfeiture and sale."

To this ruling of the court that the remedy of forfeiture and sale was not exclusive, the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows, as hereinbefore recited:

"We have left, then, the decisions of the three courts in Maine, New Hampshire and Massachusetts. And in these three States it must be conceded by the plaintiff that the law is settled beyond all doubt—without undertaking to distinguish the peculiar facts in each case—it is the settled law, so far as the courts can settle it, that this action could not be maintained except for an expression in the statutes of Great Britain, to which I will call attention later, and which expression would, perhaps, be sufficient to save it.

* * * * * * *

However, it is clear in my mind that this doctrine is contrary to the ordinary principle of law, which in this case is this,—the delivery to and receipt by the defendant of one thousand shares of the stock of the plaintiff corporation, such stock not being paid for, is like the delivery of any other property from one person to another where the circumstances do not imply a gratuity. The law is well settled that, whenever property of value is delivered from A. B. to C. D. under such circumstances as to show it is not a gratuity, C. D., by accepting delivery and retaining the property, impliedly promises to pay for it. This stock has not been paid for, and the defendant owes for it on fundamental principles of law; he owes for it to make payments at the times and in the instalments provided for in the articles of associatiȯn. It is like the case of the delivery of other property which parties understand is to be paid for in instalments."

To this ruling of the court, that the receipt of the certificate of stock by the defendant company raises an implied promise to pay for it, the defendant duly and seasonably excepted.

37 The court, in charging the jury, said in part as follows:

" We have left, then, only the question of the form of action.
Jpon that question the court has no doubt that the count relied on
s sufficient, and not only sufficient, but is in the best form for a pro-
ceeding of this character, and in the form less liable to raise unneces-
ary questions than any other possible form."

To this ruling of the court, that this action need not be in debt,
out might be in *indebitatus assumpsit* the defendant duly and season-
bly excepted.

The court, in charging the jury, said in part as follows:

"As to the statutes of Great Britain, which, under the circum-
tances, and under the authorities I have referred to, govern the con-
ract between the parties, section 16 of the companies' acts, Exhibit
, provides that 'All monies payable by any member of the com-
any, in pursuance of the conditions or regulations of the company
r any of such conditions or regulations, shall be deemed to be a debt
lue from such member to the company, and in England and Ireland
o be in the nature of a specialty debt.' That, under the decisions
o which I have referred, is clearly a part of the implied contract—
might say, the express contract—between these parties. At any
ate, it would be safe to say it was a part of the implied contract into
which these parties entered when they became shareholders in the
orporation. So, independently of the rules of the common law, and
ven if I were controlled by the local decisions of Maine, New Hamp-
hire and Massachusetts, this case would be excepted from them, and
should find here that there was an express agreement on the part
f the defendant here—not a direct contract, but arising from the re-

lations of the parties under the legislation of Great Britain—to pay this assessment. So in any view of the case, it is impossible for me to escape the conclusion that the defendant is liable in some way for this call."

To this ruling of the court, that the evidence of an agreement may be implied from the relation of the parties under the laws of Great Britain, the defendant duly and seasonably excepted.

The court, in charging the jury, said, in part, as follows:

"Now, if this case was at common law and based on common-law principles, there would be no question that this is the right form of action. Therefore, inasmuch as, in my view, this suit can be maintained on common-law principles and independently of the statutes of Great Britain, to which I have referred, perhaps I have gone far enough."

38 To this ruling of the court, that this suit can be maintained on common-law principles and independently of the statutes of Great Britain, the defendant duly and seasonably excepted.

The court, in charging the jury, said in part as follows:

"It is not really maintained by the defendant that there is any evidence here that the particular call or assessment in issue has been paid. And it is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments. If the defendant has paid this call, it is for the defendant to show it, and to overcome, by some evidence, the implication arising from what appears on the certificate of stock, that a large percentage of the par value of this stock has not been paid. The burden of proof is upon the defendant to show that this particular assessment in issue has been paid."

To this ruling of the court, that the burden of proof was upon the defendant to show non-payment, the defendant duly and seasonably excepted.

The court directed a verdict for the plaintiff, as follows:

"I wish, gentlemen of the jury, to say to you that there is no responsibility in this case resting upon your shoulders. It is on the shoulders of the court. I am liable to be in error, but, if I err, the court of appeals will set me right. I, therefore, instruct you to return a verdict in favor of the plaintiff for the amount claimed, with interest at 5 per cent. per annum, from Dec. 2, 1895."

Whereupon the defendant objected to this instruction as being against the pleadings and evidence for the reasons hereafter specifically stated.

Because (1) the declaration sets up an action in case, when it should have been in debt.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (2) the plaintiff is an alien corporation, and the declaration contains no averment or allegation as to the law of Great Britain and England under which it is claimed said corporation was organized.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

39 Because (3) the declaration contains no averment or allegation of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (4) the declaration contains no averment or allegation that said call or assessment was necessary to pay the debts of the plaintiff or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (5) the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (6) the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (7) the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of the defendant.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (8) the declaration contains no averment or allegation of the conditions of defendant's subscription to the stock of said plaintiff.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

40 Because (9) the declaration contains no direct averment or allegation that the defendant was a stockholder in said company at the time said call or assessment was made.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (10) there was no evidence in the case of an express promise on the part of the defendant, to pay such call or assessment.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (11) there was no evidence in the case that this suit was instituted or carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other obligations of the plaintiff; and because the evidence tended to show that the plaintiff was not insolvent at the time of making the call or assessment, or at the time of the institution of this suit.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for the plaintiff.

Because (12) this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation or in payment of its debts.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

Because (13) this remedy, under the statute of Great Britain, if enforcible at all, should be in debt.

Upon this ground the defendant duly and seasonably excepted to the instructions directing a verdict for plaintiff.

After the charge of the court, the defendant, by permission of the court, requested the court to give the following instructions:

41 "The court is requested to instrut the jury that, if any action can be maintained for the recovery of the sum due under the call and assessment sought to be enforced in this action by the plaintiff, the lien thereon must be enforced by sale and forfeiture of these shares before this action can be maintained."

The court refused to instruct the jury as requested, to which refusal the defendant duly and seasonably excepted.

The entire charge to the jury is made a part of this bill of exceptions, and is as follows:—

PUTNAM, *J.:*

"MR. FOREMAN AND GENTLEMEN OF THE JURY: Counsel during yesterday and the day before have fully argued certain questions involved in this case, and I am satisfied that the issues are for the court and in no way for the jury. I might, perhaps, so far as my duties are concerned, comply with them by simply instructing the jury what verdict to enter; but I think I will better save the rights of the parties by making in your presence my observations on the propositions of law submitted by counsel and other propositions submitted by them,—the observations I make to be regarded as a charge to the jury.

The first question which comes in logical order is whether or not the plaintiff in this case has met the issue raised by the defendant, that the plaintiff is not a corporation duly organized under the laws of Great Britain.

Under the statutes of New Hampshire regulating the forms of pleadings, there can be no doubt that the position of the defendant is correct, that this question can be raised under a special plea in bar of *nul tiel* corporation, and the defendant is not limited to a plea in abatement; and under the practice act of New Hampshire, the issue having been noticed in a special statement of the grounds of defence, it is open here and must be met. Those United States Supreme Court decisions which hold the pleading of the general issue waives the question of the existence of the plaintiff as a corporation, are not applicable, because, of course, the issue cannot be raised except by special plea, although it is a plea in bar.

Now, under the decisions of the Supreme Court of the United States, it would be sufficient to show that this plaintiff corporation is a corporation *de facto;* and, under the same decisions, the reten-

tion by the defendant of the certificate of stock for a number of years, produced at the trial by the defendant upon request of the plaintiff, might operate as an estoppel to prevent the defendant from denying that the plaintiff is a corporation—at least, a corporation *de facto*. However, it is not necessary to pass on that question, because I am sure that the plaintiff has proven the issue in
42 its favor so clearly that I would not be authorized to submit
it to the jury; and I am required, under the rule which prevails in this court, not to allow an issue to go to the jury when it is plain the court must set aside the finding of the jury if, in a certain direction—it is plain that under that practice I am required to pass on this question; although, to a certain extent, it involves what may technically be called a question of fact.

Now, in meeting this issue, we first have to deal with the testimony of Ramsden, who, in the answer to the first question put to him, states that he is an English solicitor, and that he is very fully acquainted with the laws of Great Britain. His answer I need not read; it is in the record. This testimony of Ramsden not having been met, or qualified, or put in issue by anything which further appeared in the case, there is no doubt that I am not required to submit to the jury whether or not he is competent to give evidence of the kind which he has given. There is no doubt that, if the jury should find he is not competent, I should be compelled to set aside the finding. He is clearly inside of the practical rule applied in *Hall v. Costello*, 48 N. H. 176. So, as already said, I would not be justified in submitting the issue to the jury under these circumstances. I am not compelled to find that he is competent as a barrister would be competent, or that he is competent to testify to the unwritten law of England; but I do find he can testify to the extent he has testified—that is to say, that he is competent to testify that the printed statutes he has produced are laws of Great Britain—at least until there is some evidence to meet his testimony or qualify it in some way. I think I am fully within the rule in that particular laid down by the supreme court of this State in *Hall v. Costello*, already referred to and which, on this question, it being a question of the introduction of evidence as a mere matter of proceeding and as a mere rule of practice, controls me, although, except for that decision, I should be compelled to find that the statutes of Great Britain could not be proved in the way the plaintiff has undertaken to prove them.

Now, considering these statutes proved by the testimony of Ramsden, there is no doubt that the proceedings under statutes which have been exhibited by the plaintiff here, constituted a corporation as alleged by the plaintiff, not only *de facto* but *de jure*. Nothing whatever has been pointed out to indicate that the statutes of Great Britain were not in all respects strictly complied with. Therefore that issue I find for the plaintiff.

Then there is no doubt that the call for this assessment has been properly proven. The only possible question which could have arisen was whether or not certain persons were the directors of the corporation at the time of the call. As to that, no issue was made.

Ramsden testified, without objection, that such and such persons,
being those named in the record of the meeting of the
43 directors at which the call was made, were the directors of
the company for that time, and that all were present at that
meeting. Perhaps, if the point had been made very closely, he would not have been allowed to have testified in that precise form, but he might have been allowed to testify that they were acting as directors. But no objection was made on that point, and it was very evident that the parties all knew that they were the directors, and intended to make no objection. Therefore, as the amended articles of association provide that calls may be made by the directors, there can be no doubt that the call in issue was properly made.

No question was made as to the regularity of the meeting of the directors. Therefore, nothing need be said about that.

Then as to the notice of the call. It is plain from the testimony that the notice was posted as required by the articles of association of the corporation. It is also plain from the testimony of Ramsden, and of the treasurer of the defendant corporation, that the notice was mailed to the defendant corporation and received by it. In view of the fact of which we must all take cognizance, that the postal service between the United States and London is international under treaty arrangements, the presumption which arises under domestic postal service, that a notice properly posted and mailed was duly received arises here. But in addition to that, although the treasurer does not personally recollect all the details about the notice, when it was received, etc., still it cannot be questioned that the jury should find that the notice was received by the bank before the call was payable, which was on the 2d of December, 1895, if I am correct.

Several objections were taken to the effect that the several transactions of the corporation proven by the plaintiff in this case were not brought to the notice of the defendant. But in view of the fact that it is clear, as I shall show with reference to the next point, that the defendant was at that time a stockholder in the corporation, it follows that, by fundamental principles of law, it is bound by all the ordinary transactions of the corporation, and is presumed to have knowledge of them all, and to be a party to them all. I, of course, exclude from this the entries made on the books of the corporation for the immediate purpose of charging the defendant. Entries of that character are not admissible. I am speaking simply of the general, ordinary proceedings of the corporation. That is a general principle of law, and is so strongly stated by the Supreme Court that I think I ought to refer to the decision of that court in which the principle has been stated.

In *Canada Southern R. R. v. Gebhard*, 109 U. S. 537, the court says: 'It follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established
policy of that government authorizes. To all intents and
44 purposes, he submits his contract with the corporation to such
a policy of the foreign government, and whatever is done by

that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony.'

That applies to so much of the general rules which I have stated as concern the laws of Great Britain, and to those laws so far as they affect this corporation, and as this corporation has proceeded with reference to them.

The statement which I made is completed by a reference to *Hawkins v. Glenn*, 131 U. S. 329. 'A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member.'

That is all I need to read from that case. Those two cases settle the proposition. The proposition is so fundamental, and well known, it is hardly necessary to refer even to those decisions, and I refer to them, not so much because they establish the proposition as because they establish another proposition to which I will call attention further on.

Now then, that the defendant corporation was a stockholder in the plaintiff corporation at the time the assessment was made is clearly and indisputably shown by the certificate of stock, bearing date some twelve years before the call, which certificate was produced by the defendant on notice here in court, and which, I must assume, the jury would find has been in the possession of the defendant corporation for a great many years.

Its power to take this stock under the laws of New Hampshire is not questioned in this case, and no issue on that matter arises.

Now, with reference to the relations between the plaintiff and the defendant, so far as these calls are concerned, I wish to make a general observation, in order that I may not be misunderstood: The plaintiff has here only the rights of the corporation itself, and it does not, as the case stands, represent creditors, and it has not the rights of a receiver. Many cases which have been cited to me by the plaintiff must be laid aside because of this distinction, which I will have occasion to refer to again further on.

Attention has been called to the fact that extracts produced here from the plaintiff's register of stockholders show that this stock was not issued directly to the defendant in this case, and that, therefore, the defendant is not chargeable as a subscriber for the stock. But there can be no doubt that the transfer was complete, that it was transferred on the register of the corporation, and that a new
45 certificate was delivered to the defendant, thereby discharging the original subscriber from all liabilities. The novation is complete and the defendant in this case is chargeable with all the liabilities of the original subscriber to the stock, whatever they were. This is so fundamental that it is not necessary to spend much time on it; but I refer to what the court says in *Webster v. Upton*,

91 U. S. 69, as follows: 'If the law implies a promise by the original holders or subscribers to pay the full par value when it may be called, it follows that an assignee of the stock when he comes into privity with the company, by having such stock transferred to him on the company's books, is equally liable.'

The next question, in logical order, is as to the law of the place which governs the relations of the parties to the alleged, implied or express contract upon which the suit is brought. The cases to which I refer, namely, *Canada Southern R. R. v. Gebhard*, 109 U. S. 537, and *Hawkins v. Glenn*, 131 U. S. 329, leave this question in no doubt whatever, even if I had any doubt, independently of them. The most striking illustration of this rule is *Relfe v. Rundle*, 103 U. S. 222, 226, wherein among other things, it was said: 'Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence.'

The *habitat* of the plaintiff corporation is London, and the parties by their own free act have submitted themselves to the laws of Great Britain with reference to their mutual relations, and to all the acts of the corporation done at its domicile which are consistent with those laws. Therefore, I must be governed by the laws of Great Britain, so far as they are shown in the case; and, so far as they are not shown in the case, I must presume them to be the fundamental principles of the common law with reference to which the Federal courts are governed by their own rules, and do not accept the decision of the local courts except so far as those decisions approve themselves to their judgment. In other words, to state the matter accurately, in so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that they are the same, as the laws of New Hampshire, where this court is sitting; but, as to the laws of New Hampshire, with reference to a question of a general character, we are not controlled by the decisions of the courts of New Hampshire except as they commend themselves to our own judgment. Decisions of the courts are, at the most, only evidence of what the law is; and, when decisions are so conflicting as they now are, they are sometimes very slight evidence.

I desire next to call attention to the fact that this stock was not non-assessable. The certificate on its face shows distinctly the par value of the stock, and also shows distinctly what percentage of the par value had been paid, at least down to December 15, 1892, the same being only a small percentage of the entire par. In short the
certificate of stock carries on its face the implication that the
46 balance of the par value of the stock is liable to be called for
and that the holder of the certificate is bound to pay it, so far
as it is possible to have such an implication without an express promise or something equal to an express promise on the face of the paper. There is no express promise on the certificate, and therefore, in interpreting it, we are called upon to look at the general principles of law which would govern such a case. I merely speak of this to show that there is nothing on the face of the certificate to embarrass the court in this litigation.

Now we come to the main question in the case, and that is, whether the defendant is liable pecuniarily for this call, or whether the only remedy is, as held by the courts of Maine, New Hampshire and Massachusetts, a forfeiture and sale of the stock; and a loss of what has been paid in upon it by the defendant or its predecessors in title.

Now, at the first blush, there were two or three cases decided by the Supreme Court which seemed to settle the question in favor of the plaintiff, namely, *Hill v. Merchants' Insurance Company* 134 U. S. 515, and *Great Western Telegraph Company v. Purdy,* 162 U. S. 329, 336; but an examination of the facts stated in the case shows that in each case there was an express promise to pay. So, on the other hand, *Scovill v. Thayer,* 105 U. S. 143, 155, contains an expression which, if not read in connection with the rest of the case, would seem to settle the law in favor of the defendant. But in that case the stock was on its face non-assessible, and therefore an action could lie only in favor of some one who represented creditors.

We have left, then, the decisions of the three courts in Maine, New Hampshire and Massachusetts. And in these three States it must be conceded by the plaintiff that the law is settled beyond all doubt—without undertaking to distinguish the peculiar facts in each case—it is the settled law, so far as the courts can settle it, that this could not be maintained except for an expression in the statutes of Great Britain to which I will call attention later, and which expression would, perhaps, be sufficient to save it. Those decisions are declared in Cook on Stockholders, 3d ed. sec. 71, and Morawetz, 2d ed. sec. 128, and sequence, to the contrary to the great weight of authority, and I have no doubt they are so and are contrary to principle. They seem to have grown out of some early decision in Massachusetts, the precise nature of which I have not had time to investigate, and have not found it necessary to investigate. I think that, possibly in these early decisions too much weight was given to the provisions of the statutes, which were enacted in all three States, providing for the forfeiture and sale of stocks for unpaid assessments. However, it is clear in my mind, that this doctrine is contrary to the ordinary principle of law, which in this case is this,—the delivery to and receipt by the defendant of 1,000 shares of the stock of the plaintiff corporation, such stock not being paid for, is like the
47 delivery of any other property from one person to another where the circumstances do not imply a gratuity. The law is well settled that, wherever property of value is delivered from A. B. to C. D., under such circumstances as to show it is not a gratuity, C. D. by accepting delivery and retaining the property, impliedly promises to pay for it. This stock has not been paid for, and the defendant owes for it on fundamental principles of law; he owes for it to make payments at the times and in the instalment provided for in the articles of association. It is like the case of the delivery of other property, which parties understand is to be paid for in instalments. This rule is clearly recognized by the great weight of authority referred to in the text books I have recited. The text books themselves are not authority, and I do not refer to them as

authority, but I refer to them as summing up the most of the decisions, and, in my opinion, summing them up correctly.

Not only is the great weight of authority as stated, but two justices of the Supreme Court have laid down the rule without hesitation, and, I think, under such circumstances, and in cases of so much importance, that we cannot escape the implication that the rule was laid down by those justices with the knowledge and approval of their associates, although in neither case was it necessary to determine this precise question.

So eminent a judge as Mr. Justice Strong, one of the most eminent ever on the bench of the Supreme Court, in *Webster v. Upton*, 91 U. S. 69, has laid down the rule positively, after a long statement, covering two pages, which I need not repeat; he concludes, 'Manifestly that would not be what the law intended; and if its intent was that the whole capital might be called in, it is difficult to see why the subscriber, knowing the intent, and voluntarily becoming a subscriber, does not impliedly engage to pay in full for his shares when payment is required.'

Mr. Justice Hunt, in *Chubb v. Upton*, 95 U. S. 668, also lays down the rule without hesitation, saying, 'The same authorities hold that one who receives a certificate of stock for a certain number of shares at a given sum per share, thereby becomes liable to pay the amount thereof, when called upon by the corporation or its assignee.' Thus putting the two—the corporation and the assignee—on the same footing.

Perhaps, if it was otherwise a doubtful question, these expressions of the two learned justices would not bind me; but being in line with what I regard as undoubted authority and the recognized principles of law applicable under like circumstances, I must hold that, even under the rules of the common law, which govern me here, and independently of the statutes of Great Britain to which I referred, the defendant is liable for this call.

I ought to observe that there is no suggestion here that the call was oppressive, or marked by those features which justify the
48 courts in preventing the enforcement of a call, either by forfeiture or action. There is no doubt but there are some circumstances, as where, for instance, the corporation has ceased to do active business, and owes no debts, under which a call would not ordinarily be enforced by the court; but the proofs here do not show anything on this point, except that the cross-examination by one witness shows, I believe, that there is a large amount of debentures outstanding, but whether the call is necessary to pay up those debentures or not, or whether this corporation is in active operation, has not been called to the attention of the court. At any rate, the defendant has not challenged the call on any such ground as that, and, therefore, the court has not been compelled to investigate anything of that nature.

Now, as to the statutes of Great Britain, which, under the circumstances, and under the authorities I have referred to, govern the contract between the parties, section 16 of the companies' acts, Exhibit 1, provides that 'All monies payable by any member of the company, in pursuance of the conditions or regulations of the company, or any such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.' That, under the decisions to which I have referred, is clearly a part of the implied contract, I might say, the express contract—between these parties. At any rate, it would be safe to say it was a part of the implied contract into which these parties entered when they became shareholders in the corporation. So, independently of the rule of the common law, and, even if I were controlled by the local decisions of Maine, New Hampshire and Massachusetts, this case would be excepted from them, and I should find here that there was an express agreement on the part of the defendant here—not a direct contract, but arising from the relations of the parties under the legislation of Great Britain—to pay this assessment. So in any view of the case, it is impossible for me to escape the conclusion that the defendant is liable in some way for this call.

The fact that this provision of the statutes to which I have referred existed, and that there are also in the same statutes certain provisions for the forfeiture of stock in case of non-payment of assessments sets aside this case entirely from all those where the courts have been inclined to hold that the granting of the right to forfeit and sell stock is by implication exclusive. That is to say, there is a class of cases where the courts justly hold that, even if at common law, there would be an implied promise to pay, yet, where the statute provides for forfeiture and sale, that remedy is exclusive. But when the statute provides both forfeiture and sale, and that the assessment, when called for, shall stand as a debt—when the two are found in the same statute, the correct rules of construction require they should both be considered as concurrent remedies; although the court would also be compelled to hold that, if the parties plaintiff elected to proceed by forfeiture and sale, they
49 could not afterwards proceed by an action, or, if by action, that they could not afterwards proceed by forfeiture and sale.

We have left, then, only the question of the form of action. Upon that question the court has no doubt that the count relied on is sufficient, and, not only sufficient, but is in the best form for a proceeding of this character, and in a form less liable to raise unnecessary questions than any other possible form. The action of *indebitatus assumpsit* has been encouraged by the courts in Great Britain and in this country. The precedent cited by the plaintiff from the second volume of Chitty's Pleadings shows that this action was clearly based on common-law principles independently of statutory principles. That *indebitatus assumpsit* is the recognized form of action for an assessment after call has been made, is undoubtedly established both in this country and Great Britain. But the law as to *indebitatus assumpsit* goes further, and it holds, with some special exceptions, that, wherever a sum of money has become due under such circumstances that any kind of promise may be implied, the party to whom the money is due, instead of declaring specially, may simply allege the debt, and the promise implied from the fact of the existence of the debt, which together constitutes *indebitatus assumpsit.* And even on policies of insurance, which are full of conditions precedent, the common practice is to count in *indebitatus assumpsit,* not only for money due on the policy, but also for the return premium.

The rules laid down in Chitty's Pleadings for the use of this form of action go to a great extent. Indeed it is the suitable remedy on a foreign judgment where an action of debt does not lie; and in actions on statutes which are not penal, and as to which any sort of an obligation in the nature of a promise can be implied, Chitty on Pleading-, as my recollection is, holds that *indebitatus assumpsit* will lie.

Now, if this case was at common law and based on common-law principles, there would be no question that this is the right form of action. Therefore, inasmuch as in my view this suit can be maintained on common-law principles, and independently of the statutes of Great Britain to which I have referred, perhaps I have gone far enough. Nevertheless, in order to meet all possible contingencies, I may add that I am of the opinion that, if the action rests on the statute which I have cited, it is properly laid in *indebitatus assumpsit.* The statute reads as follows: 'Shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.' That is, by this statute it is a debt due all over the world, but in England and Ireland it has the advantages of a specialty debt. Even if it were only a specialty debt everywhere, I have no doubt the action of *indebitatus assumpsit*
50 would lie in this country, although in England it might require an action of debt.

It is a debt all over the world, a debt founded on the charter of this corporation, or on the law which this corporation has adopted as a part of its charter, and it becomes, by virtue of the cases to which I have referred in 103 U. S., 109 U. S. and 131 U. S., an obligation in the nature of promise—a debt arising on such an obligation and, therefore, a debt on which the action of *indebitatus assumpsit* lies.

Even if we were obliged to pass on this question with the understanding that it was a specialty debt, and only a specialty debt, nevertheless the same conclusion would be reached; because, although *Fourth National Bank v. Francklyn,* 120 U. S. 747, held that a statutory liability cannot be enforced in a foreign jurisdiction except in conformity with the condition on which the right of action is given by the statute itself, that clearly does not relate to mere matters of procedure which are not essential in their character to the rights of the parties. It relates to certain preliminary conditions which must be complied with, and also to such questions as whether a party must proceed in equity where all the stockholders and all the creditors can be brought into one suit. It relates to fundamental questions of that character, and to conditions precedent. It relates to questions of procedure, practice and pleading, only when they are fundamental, and so fundamental as to affect the rights of the parties.

Except for this, it would have been impossible for the Federal court sitting in Florida to have done what it did in *Flash v. Conn*, 109 U. S. 371, or for the Federal court sitting in this circuit to act with reference to any statutory right arising in New York or in Louisiana, where remedies are under the code or according to the civil law, while remedies here are at common law. The cases cited in *Fourth National Bank v. Francklyn* have no reference to such fine distinctions as those between actions of debt or *indebitatus assumpsit*, or as between actions of case and trespass, as necessarily follows from the rules laid down in *Stewart v. Baltimore & Ohio Railroad Company*, 168 U. S. 445.

Therefore, even if in Great Britain, the action could lie only in debt, because this obligation is in the nature of a specialty, yet that could not apply to proceedings local under the practice in the four States forming this circuit, where, on foreign judgments and on foreign statutes in many cases, *indebitatus assumpsit* clearly lies.

The suggestion was made that the plaintiff was undoubtedly relying on the statute of Great Britain, and that the declaration was insufficient because it did not refer to the statute. But a foreign statute is not like a domestic statute. It is not a part of the law of the land; it is only one fact out of other facts; and while, therefore, even if in a special count, it would be necessary to refer to this statute, it would not be necessary to do so on any rule of
51 pleading applicable to *indebitatus assumpsit*, any more than it is necessary to state any other special fact. I do not think, even if it were a domestic statute, it would be necessary to refer to it. I understand a party is entitled to declare in debt or *indebitatus assumpsit*, and to maintain his action on the statute or at common law, as best he can unless in the case of a penal statute. Moreover this action is not founded on the statute. The statute simply defines the relations of the parties, and the action is based on those relations as thus defined, and on the fact that the parties have voluntarily obligated themselves to be bound by the statute. Even if the action necessarily found its origin in the statute, I should say that it flowed out of the statute through the voluntary acts of the parties establishing mutual relations between them, rather than that it was based upon the statute. Therefore, I am compelled to hold that this liability exists, and that the count in the case is sufficient.

A question arose about the answer to interrogatory 45 in the deposition of Ramsden. When that was read I was unable to exclude it, because it did not appear on the face of the answer whether or not the facts were within the personal knowledge of the witness, and an exception was taken. I observed that I could not take that from the jury, as it might be a question of fact for them to determine, whether he knew of his own personal knowledge the matters testified to. Of course, at that time I could not say what the questions to be disposed of in the case would be, nor did I know but that the question and answer might relate to something material in the case. It is perfectly plain now that the whole matter is absolutely immaterial, and no consideration could be given to it either by me or by the jury, as the evidence now stands. It is not really maintained by the defendant that there is any evidence here that the particular call or assessment in issue has been paid. And it is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments. If the defendant has paid this call, it is for the defendant to show it, and to overcome, by some evidence, the implication arising from what appears on the certificate of stock, that a large percentage of the par value of this stock has not been paid. The burden is upon the defendant to show that this particular assessment in issue has been paid. Therefore, I regard this question and answer, as the case has terminated, entirely immaterial, which, therefore, should in no way trouble the jury.

The plaintiff claims interest at seven per cent. per annum. Interest should be computed from the time the assessment was due, which was Dec. 2, 1895, to this date. I do not, however, see any authority for computing interest at seven per cent. Perhaps the plaintiff may point out some authority, but I have not seen any. I do not regard the mere determination of the corporation to demand seven per cent. authorized by its articles of association or by the law.

52 If the counsel submit the question to my discretion, I shall fix the rate of interest at the same rate as fixed in the English courts,—five per cent. per annum.

I wish, gentlemen of the jury, to say to you that there is no responsibility in this case resting upon your shoulders. It is on the shoulders of the court. I am liable to be in error, but if I err, the court of appeals will set me right. I, therefore, instruct you to return a verdict in favor of the plaintiff for the amount claimed, with interest at five per cent. per annum from Dec. 2, 1895."

The jury found a verdict, as instructed, in the sum of $6,858.67.

All of the exceptions to the foregoing rulings and refusals to rule were duly and seasonably alleged and saved, and the defendant asks that these exceptions be allowed.

C. J. HAMBLETT.
A. T. BATCHELDER.
J. S. H. FRINK.

It is hereby stipulated on the part of the plaintiff that the foregoing bill of exceptions be settled and allowed, and that the clerk insert the amount of the verdict.

GILBERT A. DAVIS,
OMAR POWELL,
Attorneys for Plaintiff.

United States Circuit Court, District of New Hampshire, October Term, 1898.

An order having been seasonably entered at the term at which the case was tried that the foregoing bill of exceptions might be allowed after the adjournment of the term with the same effect as before the term adjourned, and the same having been presented to the court within the time fixed by the court, it is hereby allowed, the same, however, having been amended by the court subsequently to the agreement of counsel attached thereto.

WILLIAM L. PUTNAM,
United States Circuit Judge.

October 29, 1898.

53 And thereafter, to wit, on the first day of March, A. D. 1899, the following agreement as to judgment is entered :—

Agreement as to Entering Judgment.

(Filed March 1, 1899.)

Parties hereby stipulate that judgment for $6,858.67, the amount of verdict and interest at five per cent. from June 30, 1898, to date of judgment, together with costs, may be entered by the Honorable Edgar Aldrich, United States district judge, not hereby waiving exceptions taken at trial.

NASHUA SAVINGS BANK,
By its attorney, J. S. H. FRINK.
ANGLO-AMERICAN LAND MORTGAGE & AGENCY COMPANY, *Plaintiff*,
By GILBERT A. DAVIS,
OMAR POWELL, *Its Attorneys.*

In this case no question has been heard or tried by the Hon. Edgar Aldrich, district judge, but parties assenting that judgment should be entered by him in the absence of the judge who tried the case, it is so entered as follows :—

Judgment.

March 16, 1899.

And now, on this sixteenth day of March, A. D. 1899, it is considered by the court that the plaintiff recover against the defendant seven thousand one hundred and thirty-one dollars ($7131.10) and ten cents damages, and costs of suit taxed at ninety-five dollars and twentyfive cents ($95.25).

A true record. Attest :

FREMONT E. SHURTLEFF, *Clerk.*

On the twenty-seventh day of June, A. D. 1899, the defendant files the following petition for a writ of error, and assignment of errors :—

54 *Petition for Writ of Error.*

(Filed June 27, 1899.)

To the honorable the judges of the circuit court of the United States within and for the district of New Hampshire:

And now comes the defendant, The Nashua Savings Bank, and complains that in the records and proceedings and also in the rendition of judgment in a plea between the Anglo-American Land Mortgage and Agency Company, Limited, and the defendant, tried in the circuit court of the United States for said district at the May term, A. D. 1898, in which judgment was rendered against the said defendant on the sixteenth day of March, 1899, manifest error hath intervened to the great damage of the said defendant, all of which will more fully appear from the assignment of errors filed with this petition.

Wherefore it prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the United States circuit court of appeals for the first circuit.

NASHUA SAVINGS BANK,
By its attorneys J. S. H. FRINK,
BATCHELDER & FAULKNER,
C. J. HAMBLETT.

Assignment of Errors.

(Filed June 27, 1899.)

Afterwards, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand eight hundred and ninety nine, at the October term, A. D. 1899, of the United States circuit court of appeals for the first circuit, at Boston, Massachusetts, come the said Nashua Savings Bank, by their attorneys, and say that in the record and proceedings in the above-entitled matter there are manifest errors, as appears from this assignment of errors, namely:

1. The circuit court erred in admitting, against the seasonable objection and exception of defendant, the evidence of Herbert Ramsden, the witness called by the plaintiff, as follows:

" Int. 45. State whether or not the amount of said calls or assessments, if any, has ever been paid to the plaintiff company by said Nashua savings bank, or by any one in its behalf, or by any previous owner of such shares?

55 Ans. The amount paid on the 1,000 standing in the name of the Nashua savings bank is £2 per share. James L. Lombard paid the first £1 per share on the said shares before they were transferred by him to the defendant Nashua Savings Bank. In 1885 a call of a further £1 per share was made payable by two instalments on the 1st October and 1st December, 1885, and the Nashua savings bank paid the company on the 28th September, 1885, £500, and on the 4th December, 1885, £500 in respect of the said instal-

ments of the said call on the said 1000 shares held by them. No other payment in respect of calls on the said shares has been made by the said Nashua savings bank, or by any one on its behalf, or by any previous owner of the said shares."

2. The circuit court erred in admitting, against the seasonable objection and exception of the defendant, the statutes of Great Britain without the statutes being duly authenticated, which statutes are as follows:

"25 and 26 Victoriæ, cap. 89.

An act for the incorporation, regulation and winding up of trading companies and other associations.

6. Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company, with or without limited liability.

7. The liability of the members of a company formed under this act, may according to the memorandum of association be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.

8. Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things (that is to say):

(1.) The name of the proposed company with the addition of the word 'Limited' as the last word in such name:

(2.) The part of the United Kingdom, whether England, Scotland or Ireland, in which the registered office of the company is proposed to be situate:

(3.) The objects for which the proposed company is to be established:

(4.) A declaration that the liability of the members is limited:

56 (5.) The amount of the capital with which the company proposes to be registered divided into shares of a certain fixed amount subject to the following regulations:

(1.) That no subscriber shall take less than one share.

(2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

12. Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital, by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing shares, or to convert its paid-up shares into

stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association.

16. The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of and be attested by one witness at the least, and such attestation shall be a sufficient attestation in Scotland as well as in England and Ireland. When registered they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained, a covenant on the part of himself, his heirs, executors and administrators to conform to all the regulations contained in such articles, subject to the provisions of this act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a special debt.

50. Subject to the provisions of this act, and to the conditions contained in the memorandum of association, any company formed under this act may, in general meeting from time to time by passing a special resolution in manner hereinafter mentioned, alter all or any of the regulations of the company contained in the articles of association or in the table marked 'A' in the first schedule where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution.

51. A resolution passed by a company under this act shall be
deemed to be special whenever a resolution has been passed
57 by a majority of not less than three-fourths of such members
of the company for the time being entitled, according to the regulations of the company, to vote as may be present, in person or by proxy (in cases where by the regulations of the company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the company, to vote as may be present in person or by proxy, at a subsequent general meeting of which notice has been duly given, and held at an interval of not less than fourteen days nor more than one month from the date of the meeting at which such resolution was first passed; at any meeting mentioned in this section, unless a poll is demanded by at least five members, a declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact, without proof of the number or proportion of the votes recorded in favor of or against the same. Notice of any meet-

ing shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and meeting held in manner prescribed by the regulations of the company. In computing the majority under this section, when a poll has been demanded, reference shall be had to the number of votes to which each member is entitled by the regulations of the company.

67. Every company under this act shall cause minutes of all resolutions and proceedings of general meetings of the company, and of the directors or managers of the company in cases where there are directors or managers, to be duly entered in books to be from time to time provided for the purpose, and any such minute as aforesaid, if purporting to be signed by the chairman of the meeting at which such resolutions were passed or proceedings had, or by the chairman of the next succeeding meeting shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting of the company or meeting of the directors or managers in respect of the proceedings of which minutes have been so made shall be deemed to be duly held and convened and all resolutions passed thereat or proceedings had, to have been duly passed and had, and all appointments of directors, managers or liquidators shall be deemed to be valid, and all acts done by such directors, managers or liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications."

3. The circuit court erred in admitting, against the seasonable objection and exception of the defendant, article 140 of the amended articles of association of the plaintiff corporation, which said article was introduced by the plaintiff and is as follows:

58 "140. If any member resident out of the United Kingdom neglect to give such address as is hereinbefore required, notices for him may be posted up in a conspicuous place in the registered office of the company; and for all the purposes of these regulations the registered office of the company shall be deemed to be the registered place of abode of such member."

4. The circuit court erred in admitting, against the seasonable objection and exception of the defendant, the annexed extract of the register of members of the plaintiff corporation, which extract is as follows:

Nashua Savings Bank, Nashua, New Hampshire.

Shares registered and purchased.						Capital paid.			
Date.	Register. No.	Transfer. No.	No. of shares.	Distinctive from.	Numbers. No.	Date.	No. of shares.	Per shares.	Amount.
1883. Oct. 18	....	5	1,000	9,546	10,545	1883. Oct. 18	1,000	20%	1,000
						1885. Oct. 30 153	......	10%	500
						Dec.— 177	......	10%	500
									2,000

I, Frederick Herbert Ramsden, secretary of the Anglo-American Land Mortgage & Agency Company, Limited, do hereby certify that the foregoing is a true and complete extract from the original records of the company.

In further testimony whereof, the seal of the company has by order of the board been affixed hereto this tenth day of December, 1895.

F. H. RAMSDEN, *Secretary.* [L. S.]

Attest: H. RAMSDEN,

—— ——,
—— ——,
Directors.

5. The circuit court erred in denying the motion of the defendant to direct a verdict for the defendant on the pleadings and evidence in the case, which motion was made upon the following grounds:

Because (1) the declaration sets up an action in case, when it should have been in debt.

Because (2) the plaintiff is an alien corporation and the declaration contains no averment or allegation as to the law of Great Britain under which it is claimed said corporation was organized.

Because (3) the declaration contains no averment or allegation of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

59 Because (4) the declaration contains no averment or allegation that said call or assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors, and contains no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

Because (5) the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

Because (6) the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

Because (7) the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of defendant.

Because (8) the declaration contains no averment or allegation of the conditions or terms of the defendant's subscription to the stock of the plaintiff.

Because (9) the declaration contains no direct averment or allegation that the defendant was a stockholder in said company at the time said call or assessment was made.

Because (10) there was no evidence in the case of an express promise on the part of the defendant to pay such call or assessment.

Because (11) there was no evidence in the case that this suit was instituted or carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other obligations of the plaintiff; and because the evidence tended to show that the plaintiff was not insolvent at the time of making the call or assessment, or at the time of the institution of this suit.

Because (12) this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation, or in payment of its debts.

Because (13) this remedy, under the statute of England and Great Britain, if enforcible at all, should be in debt.

6. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"Now, under the decisions of the Supreme Court of the United States, it would be sufficient to show that this plaintiff corporation is a corporation *de facto;* and under the same decisions, the retention by the defendant of the certificate of stock for a number of years, produced at the trial by the defendant upon request of the plaintiff, might operate as an estoppel to prevent the defendant from denying that the plaintiff is a corporation—at least, a corporation *de facto.*
However, it is not necessary to pass on that question, because
60 I am sure that the plaintiff has proven the issue in its favor
so clearly that I would not be authorized to submit it to the jury; and I am required, under the rule which prevails in this court, not to allow an issue to go to the jury when it is plain the court must set aside the finding of the jury, if in a certain direction. It is plain that under that practice, I am required to pass on this question, although to a certain extent it involves what may technically be called a question of fact.

* * * * * * *

Now, considering the statutes proved by the testimony of Ramsden, there is no doubt that the proceedings under the statutes which have been exhibited by the plaintiff here, constituted a corporation as alleged by the plaintiff, not only *de facto* but *de jure*. Nothing whatever has been pointed out to indicate that the statutes of Great Britain were not in all respects strictly complied with. Therefore that issue I found for the plaintiff."

7. The circuit court erred in charging the jury, against the seasonable exception of the defendant as follows:

"Now, under the decisions of the Supreme Court of the United States, it would be sufficient to show that this plaintiff corporation is a corporation *de facto;* and, under the same decisions, the retention by the defendant of the certificate of stock for a number of years, produced at the trial by the defendant upon request of the plaintiff, might operate as an estoppel to prevent the defendant from denying that the plaintiff is a corporation—at least, a corporation *de facto.*"

8. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"In meeting this issue, we first have to deal with the testimony of Ramsden, who, in the answer to the first question put to him, states that he is an English solicitor, and that he is very fully acquainted with the laws of Great Britain. His answer I need not read. It is in the record. The testimony of Ramsden not having been met or qualified or put in issue by anything which further appeared in the case, there is no doubt that I am not required to submit to the jury whether or not he is competent to give evidence of the kind which he has given. There is no doubt that, if the jury should find that he is not competent, I should be compelled to set aside the finding. He is clearly inside of the practical rule applied in *Hall v. Costello*, 48 N. H. 176. So, as already said, I would not be justified in submitting the issue to the jury under these circumstances. I am not compelled to find that he is competent as a barrister would be competent, or that he is competent to testify to the unwritten law of England; but I do find he can testify to the extent he has 61 testified—that is to say, that he is competent to testify that the printed statutes he has produced are laws of Great Britain—at least, until there is some evidence to meet his testimony or qualify it in some way. I think I am fully within the rule in that particular laid down by the supreme court of this State in *Hall v. Costello* already referred to, and which on this question, it being a question of the introduction of evidence as a mere matter of proceeding and as a mere rule of practice, controls me, although, except for that decision, I should be compelled to find that the statutes of Great Britain could not be proved in the way the plaintiff has undertaken to prove them."

9. The circuit court erred in charging the jury against the seasonable exception of the defendant, as follows:

"The next question in logical order is as to the law of the place which governs the relations of the parties to the alleged implied or expressed contract upon which this suit is brought. The cases to which I refer, namely, *Canada Southern R. R. v. Gebhard*, 109 U. S. 537, and *Hawkins v. Glenn*, 131 U. S. 329, leave this question in no doubt whatever, even if I had any doubt independently of them. The most striking illustration of this rule is *Relfe v. Rundle*, 103 U. S. 222, 226, wherein, among other things it was said: 'Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence.'

The *habitat* of the plaintiff corporation is London, and the parties by their own free act have submitted themselves to the laws of Great Britain with reference to their mutual relations, and to all the acts of the corporation done at its domicile which are consistent with those laws. Therefore, I must be governed by the laws of Great Britain, so far as they are shown in the case; and, so far as they are not shown in the case, I must presume them to be the fundamental principles of the common law, with reference to which the Federal courts are governed by their own rules, and do not accept the decisions of the local courts, except so far as those decisions approve themselves to their judgment. In other words, to state the matter accurately, in so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that they are the same as the laws of New Hampshire, where this court is sitting; but, as to the laws of New Hampshire, with reference to a question of a general character, we are not controlled by the decisions of the courts of New Hampshire, except as they commend themselves to our own judgment. Decisions of the courts are, at the most, only evidence of what the law is, and, when decisions are so conflicting as they now are, they are sometimes very slight evidence."

10. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

62 "In so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that they are the same as the laws of New Hampshire, where this court is sitting."

11. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"The *habitat* of the plaintiff corporation is London, and the parties by their own free act have submitted themselves to the laws of Great Britain with reference to their mutual relations and to all the acts of the corporation done at its domicile which are consistent with those laws. Therefore, I must be governed by the laws of Great Britain so far as they are shown in the case; and, so far as they are not shown in the case, I must presume them to be the fundamental principles of the common law with reference to which the Federal courts are governed by their own rules, and do not accept the decisions of the local courts except so far as those decisions approve themselves to their judgment. In other words, to state the matter accurately, in so far as the laws of Great Britain are not proved, I am undoubtedly bound to assume that they are the same as the laws of New Hampshire, where this court is sitting; but, as to the laws of New Hampshire, with reference to a question of a general character, we are not controlled by the decisions of the courts of New Hampshire, except as they commend themselves to our own judgment. Decisions of the courts are, at the most, only evidence of what the law is; and, when decisions are so conflicting as they now are, they are sometimes very slight evidence."

12. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"We have left, then, the decisions of the three courts in Maine, New Hampshire and Massachusetts. And in these three States it must be conceded by the plaintiff that the law is settled beyond all doubt—without undertaking to distinguish the peculiar facts in each case—it is the settled law, so far as the courts can settle it, that this action could not be maintained except for an expression in the statutes of Great Britain, to which I will call attention later, and which expression would perhaps be sufficient to save it. Those decisions are declared in Cook on Stockholders, 3d ed. sec. 71, and Morawetz, 2d ed. sec. 128 and sequence, to be contrary to the great weight of authority, and I have no doubt they are so, and are contrary to principle. They seem to have grown out of some early decisions in Massachusetts, the precise nature of which I have not had time to investigate, and have not found it necessary to investigate. I think that, possibly, in these early decisions, too much weight was given to the provisions of the statutes which were
63 enacted in all three States, providing for the forfeiture and
sale of stock for unpaid assessments. However, it is clear to my mind, that this doctrine is contrary to the ordinary principle of law.

* * * * * * *

Now as to the statutes of Great Britain, which under the circumstances, and under the authorities I have referred to govern the contract between the parties, section 16 of the companies' act, Exhibit 1, provides that 'all monies payable by any member of the company, in pursuance of the conditions or regulations of the company, or any such conditions or regulations, shall be deemed to be a debt due from such member to the company and in England and Ireland to be in the nature of a specialty debt.'

* * * * * * *

The fact that this provision of the statutes to which I have referred existed, and that there are also in the same statute certain provisions for the forfeiture of stock in case of non-payment of assessments, sets aside this case entirely from all those where the courts have been inclined to hold that the granting of a right to forfeit and sell stock is by implication exclusive. That is to say, there is a class of cases where the courts justly hold that, even if at common law there would be an implied promise to pay, yet where the statute provides forfeiture and sale, that remedy is exclusive. But when the statute provides both forfeiture and sale, and that the assessment when called for shall stand as a debt—when the two are found in the same statute, the correct rules of construction require they should both be considered as concurrent remedies; although the court would also be compelled to hold that, if the parties plaintiff elected to proceed by forfeiture and sale, they could not afterwards proceed by an action, or, if by action, that they could not afterwards proceed by forfeiture and sale."

13. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"We have left, then, the decisions of the three courts in Maine, New Hampshire and Massachusetts. And in these three States it must be conceded by the plaintiff that the law is settled beyond all doubt—without undertaking to distinguish the peculiar facts in each case—it is the settled law, so far as the courts can settle it, and this action could not be maintained except for an expression in the statutes of Great Britain to which I will call attention later, and which expression would, perhaps, be sufficient to save it.

* * * * * * *

However, it is clear in my mind that this doctrine is contrary to the ordinary principle of law, which in this case is this,—the delivery to and receipt by the defendant of 1,000 shares of the stock of the
plaintiff corporation, such stock not being paid for, is like the
64 delivery of any other property from one person to another
where the circumstances do not imply a gratuity. The law is well settled that, wherever property of value is delivered from A. B. to C. D. under such circumstances as to show it is not a gratuity, C. D., by accepting delivery and retaining the property, impliedly promises to pay for it. This stock has not been paid for, and the defendant owes for it on fundamental principles of law; he owes for it to make payments at the times and in the instalments provided for in the articles of association. It is like the case of the delivery of other property which parties understand is to be paid for in instalments."

14. The circuit court erred in charging the jury, against the seasonable exception of the defendant as follows:

"We have left, then, only the question of the form of action. Upon that question the court has no doubt that the count relied on is sufficient, and not only sufficient, but is in the best form for a proceeding of this character, and in the form less liable to raise unnecessary questions than any other possible form.

* * * * * * *

Therefore, I am compelled to hold that this liability exists, and that the count in the case is sufficient."

15. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"As to the statutes of Great Britain, which under the circumstances, and under the authorities I have referred to, govern the contract between the parties, section 16 of the companies' act, Exhibit 1, provides that, 'all monies payable by any member of the company, in pursuance of the conditions or regulations of the company or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt.' That, under the decisions to which I have referred, is clearly a part of the implied contract,—I might say, the express contract—between these parties. At any rate, it would be safe to say it was a part of the implied contract into which these parties entered when they became shareholders in the corporation. So, independently of the rules of the common law, and, even if I were controlled by the local decisions of Maine, New Hampshire and Massachusetts, this case would be excepted from them, and I should find here that there was an express agreement on the part of the defendant here—not a direct contract, but arising from the relation of the parties under the legislation of Great Britain—to pay this assessment. So in any view of the case, it is impossible for me to escape the conclusion that the defendant is liable in some way for this call."

65 16. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"Now, if this case was at common law and based on common-law principles, there would be no question that this is the right form of action. Therefore, inasmuch as in my view this suit can be maintained on common-law principles, and independently of these statutes of Great Britain, to which I have referred, perhaps I have gone far enough."

17. The circuit court erred in charging the jury, against the seasonable exception of the defendant, as follows:

"It is not really maintained by the defendant that there is any evidence here that the particular call or assessment in issue has been paid. And it is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments. If the defendant had paid this call, it is for the defendant to show it, and to overcome, by some evidence, the implication arising from what appears on the certificate of stock, that a large percentage of the par value of this stock has not been paid. The burden is upon the defendant to show that this particular assessment in issue has been paid."

18. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration sets up an action in case, when it should have been in debt.

19. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the plaintiff is an alien corporation, and the declaration contains no averment or allegation as to the law of Great Britain and England under which it is claimed said corporation was organized.

20. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no averment or allegations of any law of England or Great Britain authorizing the plaintiff to make the call or assessment sought to be recovered herein.

21. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no averment or allegation that said
call or assessment was necessaey to pay the debts of the plain-
66 tiff or was made for the benefit of its creditors, and contains
no averment or allegation upon what condition the plaintiff was authorized to make such calls or assessments and collect the same.

22. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no averment or allegation that any notice was ever given of such call or assessment to defendant.

23. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no averment or allegation that the defendant ever made any express promise to pay any such call or assessment.

24. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no direct averment or allegation that the payment of such call or assessment was ever demanded of defendant.

25. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no averment or allegation of the conditions of defendant's subscription to the stock of said plaintiff.

26. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because the declaration contains no direct averment or allegation that the defendant was a stockholder in said company at the time said call or assessment was made.

27. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because there was no evidence in the case of an express promise on the part of the defendant, to pay such call or assessment.

28. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because there was no evidence in the case, that this suit was instituted or carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other
obligations of the plaintiff, and because the evidence tended
67 to show that the plaintiff was not insolvent at the time of
making the call or assessment, or at the time of institution
of this suit.

29. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because this action to recover calls and assessments cannot, in the absence of an express promise to pay on the part of the defendant, be maintained, unless to enforce the collection of the sum due thereon for the benefit of the creditors of the plaintiff corporation or in payment of its debts.

30. The circuit court erred in directing a verdict for the plaintiff, against the seasonable objection and exception of the defendant, because this remedy under the statute of Great Britain, if enforced at all, should be in debt.

31. The circuit court erred in refusing to instruct the jury in accordance with the request of the defendant, which request was as follows:

"The court is requested to instruct the jury that, if any action can be maintained for the recovery of the sum due under the call and assessment sought to be enforced in this action by the plaintiff, the lien thereon must be enforced by sale and forfeiture of these shares before this action can be maintained."

NASHUA SAVINGS BANK,
By its attorneys, J. S. H. FRINK
BATCHELDER & FAULKNER,
C. J. HAMBLETT.

Bond.

(Approved July 11, 1899.)

Know all men by these presents, that we, the Nashua Savings Bank, a corporation duly established by law and doing business at Nashua in the county of Hillsborough and New Hampshire, as principal, and George W. Currier, J. H. Towles, both of said Nashua, as sureties, are held and firmly bound unto the Anglo-American Land Mortgage & Agency Company (Limited), a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland, and having its principal office and situs in the city of London, in said kingdom, in the full and just sum of two hundred and
fifty dollars, to be paid to the said Anglo-American Land
68 Mortgage & Agency Company (Limited), certain attorney,
executors, administrators or assigns: to which payment, well
and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by the- presents.

Sealed with our seals and dated this 28th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at a session of the circuit court of the United States for the district of New Hampshire in a suit depending in said court, between the Anglo-American Land Mortgage & Agency Company (Limited) and the Nashua Savings Bank, judgment was rendered against the said Nashua Savings Bank, and the said Nashua Savings Bank having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Anglo-American Land Mortgage & Agency Company (Limited), citing and admonishing it to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Massachusetts, on the twenty-seventh day of July next.

Now, the condition of the above obligation is such that if the said Nashua Savings Bank shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

NASHUA SAVINGS BANK, [BANK SEAL.]
By GEO. F. ANDREWS, *Treas.*
G. W. CURRIER. [SEAL.]
J. H. TOWLES. [SEAL.]

Sealed and delivered in presence of—
A. M. CARLTON to G. F. A., *Treas.*
CHAS. L. TOOMEY to G. W. C.
CHAS. M. WRIGHT to J. H. T.

Approved:
WILLIAM L. PUTNAM,
Circuit Judge.
July 11, 1899.

Clerk's Certificate.

UNITED STATES OF AMERICA, } *ss:*
District of New Hampshire, }

I, Fremont E. Shurtleff, clerk of the circuit court of the United States for the district of New Hampshire, within the first circuit, certify that the foregoing is a true copy of the record in the cause entitled,

69 ANGLO-AMERICAN LAND MORTGAGE & Agency Company (Limited) *v.* NASHUA SAVINGS BANK, } No. 420, Law Docket.

in said circuit court determined the petition for writ of error, the assignment of errors, and the bond to party on writ of error, and also the original citation upon the writ of error issued in said cause, with acknowledgment of service thereon.

In testimony whereof, I hereto set my hand and affix the seal of said circuit court, at Concord, in said district, the twenty-sixth day of July, A. D. 1899.

[SEAL.] FREMONT E. SHURTLEFF, *Clerk.*

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Anglo-American Land Mortgage and Agency Company (Limited), a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland and having its principal office and situs in the city of London, in said Kingdom, and a citizen of said Great Britain and an alien, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Massachusetts, on the twenty-seventh day of July next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Hampshire, wherein Nashua Savings Bank, a corporation organized under the laws of the State of New Hampshire and having its situs at Nashua, in said State of New Hampshire and district, and a citizen of said State and district, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William L. Putnam, judge of the circuit court of the United States for the district of New Hampshire this eleventh day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

W. L. PUTNAM,
Circuit Judge.

70 UNITED STATES OF AMERICA,
District of New Hampshire, } *ss:*

CONCORD, N. H., *July* 21, 1899.

I hereby accept service of the within citation on behalf of the Anglo-American Land Mortgage and Agency Company (Limited), and waive all further service.

EDWARD C. NILES,
Counsel of Anglo-American Land Mortgage and Agency Company (Limited).

71 United States Circuit Court of Appeals for the First Circuit, October Term, 1900.

NASHUA SAVINGS BANK, Defendant, Plaintiff in Error,
v.
ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited, Plaintiff, Defendant in Error. } No. 303.

Error to the circuit court for the district or New Hampshire.

Before Colt, Aldrich, and Brown, JJ.

Opinion of the Court.

April 24, 1901.

BROWN, *J.:*

This writ of error is to review the rulings of the circuit court in an action of assumpsit by the Anglo-American Land Mortgage and Agency Company, Limited, a corporation of Great Britain, to recover from the Nashua savings bank, a New Hampshire corporation, a stockholder in the Anglo-American Company, unpaid assessments upon stock. A verdict was directed for the plaintiff below, now defendant in error.

The first exception requiring consideration relates to the sufficiency of proof of the statutes of Great Britain that govern the Anglo-American Company, and also provide that "all moneys payable by any member to the company in pursuance of the conditions and regula-
tions shall be deemed to be a debt due from such member to
72 the company; and in England and Ireland to be in the na-
ture of a specialty debt." 25 & 26 Victoria, chap. 89, sec. 16.

We are of the opinion that the statutes were sufficiently authenticated by the deposition of an English solicitor familiar with company law, and a managing director of the Anglo-American Company. He states under what laws the company was organized, referring to them by their titles; and testifies that he produces copies of the acts, and, also, that "these copies are issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof." We have, therefore, evidence from a competent witness, not only that the documents are copies of the laws under which the company was organized, but also evidence authenticating printed copies of these laws. The witness does not, as counsel contend, simply produce certain transcripts which he says prove themselves, but states upon his own authority that they are copies of the laws, and also by his oath authenticates the documents as official copies. This proof is ample. *Church v. Hubbart*, 2 Cranch, 238; *Ennis v. Smith*, 14 How. 426; *Hall v. Costello*, 48 N. H. 176; *Kennard v. Kennard*, 63 N. H. 303; *State v. Davis*, 69 N. H. 350; *Barrows v. Downs & Co.*, 9 R. I. 446; *The Pawashick*, 2 Low. 142. The plaintiff, therefore, clearly proved that the defendant as a stockholder voluntarily assumed such liability as is set forth in the portion of the statute we have quoted.

The majority of the court are of the opinion that, as the record does not purport to contain all the evidence, or all the material evidence, the questions whether the circuit court erred in declining the defendant's request to direct a verdict for the defendant, and whether that court erred in directing a verdict for the plaintiff, cannot be considered. *City of Providence v. Babcock*, 70 U. S. 240, 244; *Texas & Pacific R. R. Co. v. Cox*, 145 U. S. 593, 606; *Hansen v. Boyd*, 161 U. S. 397; *Yates v. United States*, 90 Fed. Rep. 57, 62.

It appears from the record that the plaintiff introduced no evi-
dence that the plaintiff corporation was insolvent at the time
73 of making the calls or assessments sued upon, or that the call
or assessment was made for the benefit of creditors or in payment of its debts; but this statement does not cover all the purposes for which calls might be made legally, and the statement that this proof was absent does not make it appear affirmatively that other and sufficient proof was not presented. It does not appear that the call was not regularly made and for proper purposes.

The objection made upon the motion to direct a verdict that the declaration contained no averment or allegation upon what conditions the plaintiff was authorized to make such calls or assessments does not raise the question of the sufficiency of proof that the call was duly made.

We are bound to assume, upon this incomplete record, that the proofs of the regularity of this call were sufficient. The necessity for applying in this case the rule of law that regularity of proceedings in the trial court shall be assumed until the contrary appears is shown by the fact that the learned judge, in his remarks preliminary to the direction of a verdict, referred to evidence not presented here; and stated that there was no doubt that the call for the assessment was properly proven, and also that no question was made as to the regularity of the meetings of the directors.

As the majority of the court are of the opinion that we are bound to assume upon this record that due proof was made of the regularity of the corporate meetings and of the calls, we are of the opinion that the question whether we are to accord to the corporate proceedings of a foreign and alien corporation the same presumption of regularity that exists in respect to domestic corporations does not arise upon this record.

The remarks of the learned judge in directing a verdict for the plaintiff were simply explanatory of the views of fact and law that led him to take that course, and were not subject to exception. The court itself determined the issues; and the question whether it erred in so doing can be determined only upon a complete record of the evidence, or upon a record containing all material evidence. This record is not shown to be such.

74 We think that only two substantial questions are presented; the first as to the sufficiency of the proofs of the English statutes, which we have considered, and the second the question whether the company, in seeking to enforce the payment of calls, is restricted to the sale and forfeiture of the defendant's shares, in accordance with the law of New Hampshire. We are clearly of the opinion that it is not. The present action is not, strictly speaking, founded upon an English statute, but upon an obligation voluntarily assumed by the defendant as a stockholder. The English statute that became a part of the charter of the company defines the liability of the stockholder; but it is the act of the defendant in voluntarily assuming this liability by the purchase of its stock that is the basis of the present action. *Canada Southern Railroad v. Gebhard*, 109 U.S. 537; *Hawkins v. Glenn*, 131 U.S. 329; *Webster v. Upton*, 91 U.S. 69; *Relfe v. Rundle*, 103 U.S. 222, 226.

Though it appears by the articles of association that the company has a lien upon the shares of a stockholder, and may enforce such lien by sale or forfeiture, yet this is not the exclusive remedy; for, by the statute which has become a part of the articles of association and to which it has consented, the bank became liable also as for a debt. The company, therefore, has two concurrent remedies, and was strictly within its right in electing to proceed by an action at common law instead of by sale and forfeiture.

If we assume that the question of the form of action properly arises upon this record, the exceptions which relate to the form of action must be overruled, since we are of the opinion that *indebitatus assumpsit* was the proper form of action. 2 Chitty on Pleading, star p. 53; Gould on Pleading, chap. III., sec. 19; *Pullman v. Upton*, 96 U.S. 328; *Mandell v. Swan*, 154 Ill. 177.

The judgment of the circuit court is affirmed.

75 **Aldrich**, *J.*, dissenting:

The plaintiff is an alien business company organized under what are known as the English companies' acts, and I disagree with my associates upon the questions as to the sufficiency of the evidence to warrant a verdict, and as to what is shown by the record, and as to presumptions of evidence below not stated in the record. In this case, at the close of all the evidence, contrary to the situation in *Hansen v. Boyd*, 161 U. S. 397, cited in the majority opinion, the defendant moved the court to direct a verdict in its favor upon the pleadings and evidence in the case, and if under such circumstances the appellate court must assume that the court below had before it sufficient evidence to justify its ruling, it can never review the question whether the evidence there was sufficient to justify a verdict for the plaintiff. Moreover it is expressly shown by the record at page 27 that "the statutes, memorandum and articles of association, certificate of stock, and Frederick H. Ramsden's testimony constitute all the evidence bearing upon the question of the plaintiff's incorporation and organization," and the record, at page 26, expressly negatives the presence of certain other proofs which I maintain were necessary and essential to plaintiff's case. So, as I view the record, it is one which purports to present all the proofs material to the question of sufficiency of evidence. The essential question here is, whether there was evidence sufficient to warrant the verdict, and upon that question we must look to the record and cannot look beyond. The motion below and the exceptions raised that question distinctly, and the case, coming here upon such exceptions based upon such a motion, called for all the evidence, and we are bound to assume that it is all here, and inquire whether, upon the evidence disclosed by the record, the verdict was warranted. I dissent upon the ground that upon the evidence below, as shown
by the record, unaided by presumptions of regularity of cor-
76 porate proceedings, and presumption or intendment in favor
of business necessity, there is no sufficient evidence to warrant the verdict. Aside from presumption the plaintiff's case is a mere shadow, with no evidence to show that it is anything more than a paper organization,—a mere fiction. There is no evidence to show that the corporation ever did business, that it has any debts behind it or business before it,, and coming here and bringing its suit where it is not maintained as a matter of right but upon grounds of international comity only, presumptions of corporate regularity and business necessity should not be accorded to it in order to establish or aid a recovery, but on the contrary for abundant reasons the corporation should be required to prove its case by affirmative evidence, not alone of a regular call, but of a regular organization, regular corporate proceedings, and compliance with all the requirements of the home statute, and evidence that the company has either done business and needs money to pay debts, or is a going concern and needs money for legitimate business purposes within the scope of the line expressed in the articles of association.

A careful examination of the record and observations of the court below in directing a verdict show that the learned judge disposed of this case there upon the idea that it was only necessary, to make out its case, for the plaintiff to show a formal organization, that the defendant was a shareholder, and that the particular call upon the defendant below was regular on its face; and the majority opinion of my associates proceeds upon the idea that as it does not appear that the call was not regular and for proper purposes, that the verdict should stand, and so in effect accords to the plaintiff a presumption that the corporate proceedings were regular and that the call was for proper purposes. It is from this view and the effect of it that I dissent.

I am fully persuaded that a plaintiff ought not to recover under the circumstances of this case on the meagre proofs presented. Though the share subscriptions are nearly ten years old there is no
evidence that this company ever did a dollar's worth of busi-
77 ness, or intends to do a dollar's worth of business, or that
shareholders other than the foreign shareholders who failed to register their address at the home office have ever been called upon, or that it is ever proposed to call upon other shareholders. Proofs as to other shareholders were treated below as entirely unnecessary to the plaintiff's case, and immaterial to the defendant's case, as will be seen by reference to assignment of error seventeen, where it was said, subject to exception: "It is of no sort of consequence, so far as this case is concerned, what happened about other calls or assessments," and the view of the court below in this respect is further illustrated by reference to page 28 of the record, where, subject to exception, it was said upon a question as to the introduction of an extract from the company records for the purpose of showing that the Nashua savings bank was a shareholder: "I will rule that, if the entire record were here, I should not allow anything read except this. This appears to be the entire record relating to this defendant." And by reference to assignment of errors six, seven and fifteen, including, of course, assignment seventeen already referred to, it will be seen that the case was treated as one in which it was only necessary for the plaintiff to show a corporation *de facto*.

Quite aside from the alien character of the situation presented, which I shall consider later on, and notwithstanding that under the English and American authorities it is necessary to an enforcement of a contract of this character that all the shareholders should be treated alike, and that the call should be regularly authorized and made, and impartial and uniform among all the subscribers (see Cook on Stockholders, sect. 113, 114 and notes; 23 Am. & Eng. Enc. Law 808 (5) and notes; Morawetz on Private Corporations, sect. 154; *Company v. Burnham et al.*, 79 Wis. 47); the question as to other calls was treated as unessential and altogether immaterial and unnecessary to the plaintiff's case.

Again, aside from the alien phase of the situation, where, as in this case, the subscription contract by fair implication contemplates
a strict performance of the statutory requirements and a strict
78 compliance with the association regulations, or where, as in
this case, the statute (Vic. 25, 26, cap. 89, sect. 16) makes the

proceedings and records binding under certain formalities and conditions, compliance with the statutory and association regulations becomes an implied condition precedent to liability, and performance and compliance must be shown, as to illustrate, where the capital is fixed at a certain amount, the law implies that the capital shall all be taken before the corporation can enforce a call against a single shareholder (Morawetz on Private Corporations, 2d ed., sect. 137, and authorities, *n.* 1, p. 140), or as where the charter provides that a certain amount shall be subscribed before the call, a subscription is a mere offer until the amount is subscribed, and the entire amount must be subscribed in good faith, and must not be fictitious (*id.* 141), or as where shareholders are to pay when required by a vote of the board of directors there is an implied condition precedent to liability that a regular call shall be made upon all the shareholders, and this is so even where there is no express provision in the charter or contract of subscription (*id.*, sect. 143). And this is upon the idea that the shareholders mutually agree to contribute capital when certain persons shall have made a call in a certain manner, and not before (*id.*, sect. 155); or as in an action against a shareholder to recover the amount of a call, the plaintiff must allege and prove both that the defendant is a shareholder and that all conditions precedent to his liability have been performed (*id.*, sects. 141, 158; *Central Turnpike Co. v. Valentine*, 10 Pick. 142; *Fry v. Lexington R. R. Co.*, 2 Met. (Ky.) 314, 323, 324). And this is because the agreement of the shareholder is to contribute after an authorized call has been made by properly elected agents, and until such a call has been made, a condition precedent to his liability remains unperformed. (Morawetz, sect. 150.) So, upon the same principle, where the share subscription is payable in pursuance of conditions and regulations, and where the certificate is expressly made subject, as in this case, to the articles of association and the rules and regulations of the company, performance and compliance
79 should be required to be shown by proper affirmative proofs rather than allowed to stand upon presumption and intendment.

That part of section 16, c. 89, Acts of Victoria 25 and 26, to which the majority opinion refers as establishing the voluntarily assumed liability of the defendant, was doubtless only intended to declare and prescribe the nature of the remedy; that is to say, that the subscription should be deemed a debt due from him, and in the nature of a specialty debt in England and Ireland, to be recovered by an appropriate action; but, however that may be, it is sufficient for my purpose to say whether it was intended to fix liability or to declare the nature of the remedy, it in express terms makes moneys payable by members "in pursuance of the conditions and regulations," thereby recognizing and expressing what is always read into such contracts whether expressed or not, that liability is incident to, and conditioned upon fulfil-ment by the other party, by compliance with statutory and associate regulations; and compliance and performance, therefore, become a substantive element of the plaintiff's case to be established by evidence. Even if the record discloses sufficient evi-

dence of the face regularity of the calls, which I deny, there is no pretension in the record, or in the majority opinion, that there was any evidence that the calls were authorized by the resolution which the statute and the articles of association contemplate, or that the calls were uniform or necessary to pay debts or to do corporate business, or that there was any evidence showing whether the corporation was going or winding up, whether this attempt to recover is for corporate purposes, or whether the detached and incomplete extracts from the record are remnants of an exploded and defunct experimental association in the hands of speculators who found them in an attic. I am not contending against shareholder contract liability, as a general proposition, but that a plaintiff should be required to show that it has done the things which the statute and the contract contemplate should be done in order to mature the liability—that the recovery should be upon substance rather than
upon shadow. The corporate field of the last ten years is
80 strewn with wrecks of speculative associations, wrecks of cor-
porations organized to do all sorts of things, all the way from making cork from wood pulp to extracting gold from the seas. Records of such corporations can be had by the finding. The back rooms of vacated offices are filled with records and debris of experimental and defunct corporations—some with records complete upon their face, and ornamented certificates of stock fair to look upon—which never started business, and others with incomplete records and partially filled subscription lists, ranging from one subscriber to ninety-nine per cent. of the whole, which have attempted business and failed; and the length of struggle for life and the time of ultimate death are variously and mysteriously marked. If a case can be made out by simply showing organization and presenting a fragmentary extract showing a single subscription, and a scrap from the records showing a single call, by a corporation which never did business and never proposes to do business, and which carries, perhaps, two or three subscriptions for shares only, the door is open to abuse, and recovery is easy and convenient for those who may hunt up and get possession of the records of wrecked and defunct corporations; but, to my mind, the corporate right of recovery upon a naked subscription contract should not be, and is not, so arbitrary, absolute and conclusive as to justify a verdict founded upon such a meagre and unsubstantial showing.

In my view, the defendant's motion for a verdict for want of evidence, and its contention against the verdict on the ground of insufficient proofs and evidence, and its exceptions to the ruling denying the first and to granting the second, sufficiently raise the question, and therefore demand consideration at the hands of this court, and the particular manner in which the question is raised is pointed out further on.

This organization is a mere business arrangement, having none of the formalities of judicial proceedings, and not all of the formalities of corporate proceedings incident to our own statutory corporations,
but before entering upon a discussion of the particular ques-
81 tion as to the alien character of the plaintiff and the measure
of proof to be required in a case like this, and as bearing

thereon by analogy, I desire to point out the caution with which courts receive and enforce even the solemn judgments *in personam* of courts of alien countries.

The particular question is one of substance and one of vast practical importance. It relates to the measure of proof to be required in respect to corporation or company necessities, and in respect to the regularity of corporate or company proceedings, including that of assessment calls upon stockholders in an alien country, where enforcement of alien rights is sought on grounds of international comity. And as bearing upon this question, by reason of the force of analogy, we must keep in mind the caution exercised by the courts of all countries in respect to accepting without proper proof the solemn statute laws of another and an alien country, as well as the reluctance with which the courts of the various countries have accepted as conclusive even judgments *in personam* of courts of foreign and alien countries. The opinion of the Supreme Court by Mr. Justice Gray, *Hilton v. Guyot,* 159 U. S. 113, presents an exceedingly interesting and valuable historical and judicial review of the principles of international law involved in the question as to the credit and effect to be given to judgments of foreign countries, and of the rules of comity and justice which should control their enforcement.

That case involved a judgment of a court of the French republic having general jurisdiction, which was sought to be enforced in the courts of the United States against a citizen of this country, and as a result it was treated as not entitled to the full credit which is accorded to judgments of the courts of our sister States; but upon reasoning in respect to international conditions, it was said, in effect, if it appears from the judgment that it was rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs and an opportunity to defend, and the proceedings are according to the course of a civilized jurisprudence and are stated in a clear and formal record, that the judgment is *prima facie* evidence at least of the truth of the matter adjudged, and conclusive of the merits, unless special ground is shown
82 for impeaching it, or by the principles of international law,
and by the comity of our own country, it is not entitled to full credit and faith. Thus it will be seen that, before the foreign judgment is accepted as *prima facie* evidence, it must appear as a substantive part of the plaintiff's case—not irregularities shown by the defendant, not want of jurisdiction and due allegations and proofs and lack of opportunity to defend shown by the defendant, or that the proceedings were not according to the course of civilized jurisprudence shown by the defendant—but it must appear in the plaintiff's case that the judgment was rendered by a competent court, and one having jurisdiction of the cause and the parties, and one founded upon due allegations and proofs and opportunity to defend, and that the proceedings are according to the course of a civilized jurisprudence, and that they are stated in a clear and formal record, and, when this is made to appear by the plaintiff, a judgment will be accepted as conclusive, unless the defendant shows

ground for impeaching it, like fraud or prejudice, or that by the principles of international law, or by the comity of our own country, it is not entitled to credit and effect. To illustrate, by taking an extreme view in respect to international comity, in France, a judgment of a foreign country sought to be enforced there is subject to an examination on its merits—*au fond*—on the view that judgments in favor of a foreigner against a Frenchman by a foreign court are subject, when execution of them is demanded in France, to the revision of the French tribunals which have the right and the duty to examine them, both as to the form and as to the merits. Of course such a rule does not obtain between this country and Great Britain, and is only referred to as showing the measure of judicial caution exercised in respect to assumptions of conclusiveness and regularity when foreign and alien situations are presented.

So it is seen that foreign judgments are received and enforced with caution. And it is a vast step from a judgment of a court of general jurisdiction founded upon notice to the adverse party and actual trial, which is to be received with caution and upon
83 certain proofs, to the binding force of proceedings of private
foreign corporations or corporate companies. The contractual liability of stockholders under an English corporation or company like that in question is not like the contractual liability existing under the constitutions and statutes of our sister States, like that of Kansas, or Ohio, or Minnesota, which we are so frequently called upon to consider, for the reason that under these constitutions and statutes the liability of the stockholder resides in the express provision of the constitution or of the statute of the State, while the English statutes simply provide for the organization of the corporation or company, and authorize liability to be created by corporate or company action. In the first instance the liability results from the provisions of the constitution and the statutes, while in the second instance the liability, if its exists, is created by the acts of the parties, and under such circumstances enforceable liability can only be created by lawful and regular corporate and statutory proceedings, which must be shown, and ought not, and cannot with any measure of safety, be presumed.

When called upon to enforce against stockholders the Kansas constitutional and statutory contract, right of enforcement depends upon the judment against the corporation, and enforcement proceeds upon the idea that all of the stockholders have been concluded by the judgment based upon service upon the corporation. Under statutes like that of Ohio, we hold that enforcement by a Federal court of the constitutional liability created by a sister State is conditioned upon a joinder of all the stockholders and the corporation, and proof that the contemplated statutory ascertainments have been made; and under statutes like that of Minnesota, enforcement is upon condition that the statutory and equitable requirements have all been complied with. And there is, as it seems to me, and as has been observed, a wide difference between an express constitutional or statutory provision which creates a liability from the stockholder to the creditor, and a permissive business arrangement under the statutes of Great Britain where the liability is to be created by corporate vote or regulation.

84 The acts referred to in the record are various acts of Victoria, and among them is an act for the incorporation, regulation and winding up of trading companies and other associations, with amendments; another, an act to amend the companies' acts; others, in respect to banking associations. But the plaintiff company was organized under the companies' acts. These acts provide that certain persons may associate themselves together for a lawful purpose, that the liability of the members may be limited to the amount unpaid on the shares, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up; and in case the company is formed on the principle of having the liability of its members limited to the amount unpaid on the shares, that various things shall be done, and registered, and among other things to be stated and registered is the object for which the proposed company is established. It also provides that certain modifications of the conditions may subsequently be made; it provides that the articles of association shall be printed, and, when certain other things shall be done, that the articles shall be registered, and that when these statutorily required things are done, that the articles shall be binding upon each member of the company, and that all moneys payable by members shall be deemed a debt due from such member to the company, and in England and Ireland to be in the nature of a specialty debt. It provides for passing special resolutions, by a majority of not less than three-fourths of the members, under certain and various conditions.

The memorandum of association in question describes the purposes of the enterprise and various other things, and in an amended article, it is provided that the directors may from time to time make such call as they may think fit upon the members in respect of all moneys unpaid on their shares. But it is understood from paragraph ten of the amended articles that the calls are to be authorized by resolutions of the directors, or of the association. The articles also provide that the number of directors shall not be less
85 than three nor more than ten; that each director shall own fifty shares at least in the company, and that the office shall be vacant if he ceases to own, in his own right, at least fifty shares, or if he hold any other office or place of profit under the company, or if he be absent from the meeting, as provided under the articles; or if he be adjudged bankrupt, or if he suffers his estate to be vested in any person for the benefit of his creditors, or compounds with his creditors, or suspends payment; or if he is individually concerned in or participates in the profits of the company, or if he participates in the profits of any work done by the company.

It is also provided by the articles of association that the directors shall cause minutes of various things to be made in books provided for the purpose, and among other things of all orders made by the directors and committees of directors, and of all resolutions and proceedings of meetings of the company.

And, by the express terms of the defendant's certificate of stock, the holder's rights are made subject to the articles of association and the rules and regulations of the company.

The pleadings in this case, among other things, put in issue the question whether the corporation was ever duly organized, whether all the shares necessary to enable the corporation to be duly and regularly organized have been subscribed to, and among other things the defendant in its pleadings set out that "the assessments attempted to be collected in this suit are invalid, unlawful and unauthorized."

It appears from the record, page 26, that the plaintiff introduced no evidence whatever that the plaintiff corporation was insolvent at the time of making the calls or assessments sued for, or at the time of the bringing of this suit, or that the call or assessment was made for the benefit of its creditors or in payment of its debts.

The fifth assignment of error, under paragraph four, is upon the ground that the declaration contains no averment or allegation that the call or assessment was necessary to pay the debts of the company, or was made for the benefit of its creditors, and that it contains no averment or allegation upon what condition the plaintiff
was authorized to make such calls or assessments and to col-
86 lect the same. So it appears that there was no allegation as
to the financial condition or financial necessities of the corporation, and no evidence of its insolvency, or of the necessity for a call for actual business purposes, and that there was no evidence that the various conditions and restrictions contained in the various statutes and in the various articles of association had been complied with; and that there was no allegation or proof whether the company was engaged in business or had ceased to do business, or that the call was made upon all the members of the company alike.

The fifth general assignment of error is that the court erred in denying the motion of the defendant to direct a verdict for the defendant on the pleadings and evidence in the case.

The nineteenth assignment goes to error in directing a verdict for the plaintiff. Various grounds are stated, and, among others, that in assignment twenty-eight, which goes upon the ground that there was no evidence in the case that this suit was instituted and carried on for the benefit of the creditors of the plaintiff, or that this call or assessment was made for the payment of debts or other obligations of the plaintiff; and under assignment twenty-nine, that, in the absence of express promise to pay on the part of the defendant, the action cannot be maintained unless to enforce the collection of the sum due for the benefit of the creditors of the plaintiff corporation, or in payment of its debts.

It is true the particular question as to the difference in the rule as to measure of proof applied to domestic corporations and that to be applied to foreign or alien corporations was not expressly called to the attention of the court below. But it seems to me although the question of distinction between foreign and domestic corporations was not expressly urged *in extenso* to that court, that it was sufficiently covered by the brief statement, the motion for a verdict for the defendant and the grounds stated in support thereof, and the exceptions to the order directing a verdict for the plaintiff and the grounds there stated; and that the assignments of error entitle counsel to urge it here for our consideration and that we ought therefore to deal with it.

87 Assignment twenty-nine is upon the distinct ground that there was no evidence that this suit was instituted and carried on for the benefit of creditors, or that the call or assessment was made for the payment of debts or other obligations of the plaintiff. The exception on which this assignment is based, under a familiar rule, called for all the evidence on that point, yet the record does not disclose any evidence whatever on the subject. While this assignment expressly raises a particular question, by fair and reasonable inference it also raises the question whether the corporation is a going corporation or is winding up, and, if winding up, whether the money was needed to pay legitimate debts of a corporation, whether there were any debts, or whether the money was going into the pockets of whoever succeeded in recovering upon the naked assessment. Aside from intendment and assumption, there is nothing tending to establish which way it is. There is no evidence that the corporation was out of business, or that it was doing business.

Under our own system of territorial and State divisions, there is no imperative and absolute rule of right, among the States, aside from that involved in the provision of the Constitution of the United States as to judgments of sister States, by which actions at law are maintained extraterritorially to enforce rights involved in corporate or other conditions existing in jurisdictions foreign to the *forum* where aid is sought. Such aid is, however, usually rendered on grounds of public policy, comity and justice, and so, in respect to international conditions involving alien corporations enforcement does not exist as a matter of right, but on the ground of wholesome international comity.

It is claimed by this company that the right of recovery does not stand here like that of a right involved in a judgment; that is to say, a judgment concludes because the defendant has been notified and his rights adjudicated, while in this case it is insisted that the right rests in contract, and that the stockholder is concluded by corporate or directorship action, upon the ground of representation,—upon the ground that his rights were represented by the corporation, and that the directors and other members with 88 whom he was associated were his agents for such purpose. I recognize this distinction between contracts and judgments, but upon rules of analogy I say, if the plaintiff, in order to secure an enforcement of his judgment, under alien conditions must prove the solemn laws of an alien country, and show due allegations and proofs, and due proceedings in the usual course of civilized jurisprudence, and formal records of courts of foreign countries of general jurisdiction, and that the merits of the judgment controversy were not extrajudicial, that there are far weightier reasons for requiring the same measure of proof and security in respect to the corporate management of the affairs of alien corporations and their proceedings; in other words, as a condition of enforcement an alien corporation may be required to make full proof of the regularity of its proceedings according to the domiciliary law; that its calls were in the regular course of its business, and that the money called for was for the purpose of carrying on the business contemplated by the articles of association, or necessary to pay the debts of the association if the corporation was insolvent and not going; that the calls were duly made upon all the stockholders alike, with no discrimination in favor of domiciliary stockholders or against foreign stockholders; and that the necessity existed in respect to business done within the scope of the contemplated purposes of the association.

It is true the limitations upon the doctrine of corporate representation of stockholder interests as applied to distant alien countries have never been defined or much discussed, so far as can be learned; but I think under alien conditions, even if the relations are that of principal and agent, or if the parties were associated together for a general purpose, and if the doctrine of representation applies, that it is not unreasonable in a case of this kind, where relief is sought in a country foreign to the corporation, to require the plaintiff suitor to show that the corporate agent acted altogether within the scope of the authority. I do not view this as one presenting the purchase of a certain number of shares of a certain par value, but as a subscription
89 to shares upon which calls or assessments may be made as
necessities occur, and, as the shares are expressly subject to the articles of association and to the rules and regulations of the company, and by implication to the law of the domicile, it is not, unreasonable to require the corporation to show that its assessments, its necessities and proceedings, are altogether within such scope. On the contrary it is quite reasonable, and justice and safety require, that the party seeking enforcement shall show that all the conditions contemplated by the domiciliary law and the articles of association have been complied with.

I do not think comity or justice require that we should accord to corporate proceedings of a foreign and alien corporation the presumption of regularity which exists in respect to domestic corporations, or that the doctrine as to the representative character of the corporation should, without limit, be extended to distant alien corporate action of business companies formed under general statutory laws of foreign countries, and that foreign corporate action should be accepted as conclusive of the rights of the parties. The power of the corporation to represent the stockholder depends upon the scope of the agency, and the scope of the agency depends upon the statute, the articles of association, and the character of the business; and the fact that proper corporate and statutory conditions exist should be shown by the plaintiff. While certain assumptions may be safely made with respect to domestic corporations, and while certain conclusions may be safely drawn from domestic representative situations, and certain presumptions safely accorded in respect to

domestic corporate regularity and necessity, under circumstances such as involved in this case no principle of international comity is violated by requiring the contractual corporate and statutory facts to be shown by the foreign suitor seeking aid in a country alien to the domicile of the corporation. It is the policy of the law in some cases to place the burden of proof upon a party when the facts are peculiarly within his knowledge, and not within the knowledge of
the other party. Greenleaf on Evidence, vol. 1, § 79; *id.*,
90 §§ 32, 34, 79. Rules as to burden of proof, and as to presump-
tions, are rules of convenience based on expediency and adopted from motives of public policy. Questions as to such rules do not involve matter of substantive right but relate rather and only to conduct of trials, rules of evidence and the measure of proof to be required. Under alien corporate and statutory conditions such as here presented, considerations of convenience, expediency and public policy require that the foreign suitor's case shall not be made out by presumption or intendment, or by operation of technical domiciliary rules as to burden of proof, yet doubtless where representative capacity is created and is shown to continue, right of enforcement would not be affected by alien conditions, and doubtless the subscription creates the representative relation; but under alien conditions, as already said, assumption and intendment should not be invoked to establish the fact that the relation continues—in other words, that the proceedings, business and conditions of the corporation continue to be such as to entitle it to bind the stockholder upon grounds of representation, and a foreign corporation relying upon the alleged or supposed representative capacity, may and should be required to show that it has proceeded within the scope of the authority and within the contemplated agency.

Moreover, as has been said, the English statute does not create the right, it simply permits an association to organize for a purpose; and a corporation which undertakes to enforce the supposed right in a foreign country should be required to make full proof that the right is founded upon the contemplated authorized conditions, upon regularity of non-discriminating proceedings, and the necessities of the business. It does not follow, because upon proper pleadings between resident suitors the burden of showing the absence of these things may be placed upon the defendant, that a foreign plaintiff, who asks that a supposed foreign right shall be enforced in a country alien to the right, should not be required to make full proof in respect to regularity of proceedings and the necessities for a corporate call. It has been recently held here, as has been said, that a stockholder liability, created by an express constitutional provision of a sister State, will not be enforced against
the stockholder, unless it affirmatively appears that all
91 things which the statute contemplated should be done, have
been done. Equitable and legal considerations require that a foreign corporation shall make the same full showing. This is no special hardship upon the alien plaintiff, and it affords only a reasonable measure of security to a defendant stockholder foreign to the domicile of the corporation. If the attorney of an English cor-

poration may make out his case by producing the statutes and the articles of association, and a piece of paper with six lines showing an assessment call, without being required to show regularity of proceedings, or that the assessment call was uniform and in respect to transactions not *ultra vires*, or that the money was needed to carry on the going business, or to pay the debts of a business that is being closed out, such assessment calls must become the foundation for enforcement, if they come from corporations operating under English statutes in the remote colonies of the British Empire, or from France, or Italy, the late Republic of South Africa, or from Kamchatka or Japan.

Of course this view is quite aside from intendment made in favor of domestic corporations like that suggested in *Webster v. Upton, assignee*, 91 U. S. 65; *Chubb v. Upton*, 95 U. S. 665; *Telegraph Co. v. Purdy*, 162 U. S. 329, 336. Such cases go upon the idea that the contract is to pay the full par value of the authorized stock when required and when called, and certain intendments as to corporate conditions are made on the ground that the call concludes certain questions. Such intendments or presumptions are based upon matters of domestic concern and result from domestic conditions and peculiar interstate relations and necessities; but it must be said that these cases contain no hint or suggestion that presumption or intendment of due regularity or that the idea of conclusiveness should be extended to foreign private corporate or company action. Under our peculiar conditions of territorial divisions and our peculiar quasi-interstate judicial system certain intendments and presumptions as to corporate existence and corporate regularity may not stop at State lines, but should such presumptions and in-
92 tendments as to corporate conditions extend beyond national
lines or the lines of realms, and to private corporations organized under foreign statutory laws and doing business in distant and alien countries?

I do not think international comity, public policy or justice, require us to make such intendments or presumptions in favor of an alien corporation. And my contention in this respect is rested upon the ground that the same intendments and presumptions should not be accorded to corporations of distant alien countries that are accorded to corporate institutions of our own creation which are directly responsible to the local domestic legislatures creating them, and subject to the restraints of the domiciliary courts.

The record in this case does not even show the statutorily contemplated and intended resolution of the company or of the directors as the foundation for the call; or any special resolution conforming to the provisions of the statute. So far as this record shows, there are many provisions of the statutes and of the regulations of the company which may not have been complied with, and indeed, while a call must be for the *bona fide* purpose of raising money for corporate purposes, and while it must be impartial and uniform among all the subscribers or shareholders and made on all alike (Cook on Stockholders, §§ 113, 114), aside from presumption and intendment, for aught that appears in the record this company may

be out of business, the money may be intended for *ultra vires* purposes, and this assessment call may be upon this defendant only, or at most upon the non-resident stockholders only, of all the shareholders. Thus the plaintiff presents a naked assessment call of a private corporation of a foreign and alien country, without proof of necessity or of *intra vires* purposes, or that all of the shareholders have either paid or been called upon to pay. While the shareholder liability in this company is not upon express condition that the shareholders shall bear the company burdens equally, or that these things shall be made to appear, it *is* expressly subject to the regulations of the company, and, by force of operative construction, to the law of the foreign land. And a court called upon to
93 enforce the supposed right against its own citizens may well require, as a condition upon which the supposed alien right founded in foreign statutory and corporate conditions will be enforced, that conditions shall be shown to exist which justify and make the call necessary; that there is no discrimination in favor of the shareholders of the domicile of the corporation, or against those foreign to the domicile; that the intended use of money called for is within the general scope of the business originally contemplated or subsequently legally authorized, or to pay debts accruing in respect to the authorized business of the association; and that the corporate proceedings are regular, and in accordance with all the regulations and by-laws of the corporation and all the provisions of the foreign statutes, and all the requirements of the foreign common law. It is not unreasonable to require a foreign suitor who seeks enforcement of a foreign right to show that his right is fully and fairly within the purview of the foreign law and within the scope and the necessities of the foreign enterprise. Such a rule would not impose so great a hardship upon the foreign corporate suitor who seeks the relief, and who has all the records and all the necessary evidence at hand, as we should impose upon our own citizens by subjecting them to recovery upon the naked proof of an assessment call by a private foreign corporation, or, as the only alternative, compel them to go to a foreign country and show that the corporation was not within the law, that the proceedings were not regular, and that the business and the assessment purposes were *ultra vires*.

At the arguments we called the attention of counsel directly to the question whether, under the jurisprudence of England, conclusiveness is accorded to corporate action involving internal management of corporations created by and doing business in countries foreign to England. No satisfactory answer was given in the subsequent brief on this point, and I should doubt whether English courts would enforce stockholder liability upon the naked evidence of a single assessment call certified by the secretary of a private business corporation organized under our statutes and operat-
94 ing either in our new and distant possessions or in our important business centres. Some English authorities were cited, based upon cases arising from the colonies of Great Britain, but none as to judicial treatment of American private corporation assessment calls in the courts of England.

I do not feel called upon to enter upon a discussion of the English cases, or to inquire whether this action, with the measure of proofs here presented is sufficiently within the English authorities to be maintained there, for the reason that the rule of evidence and the measure of proof required in the domestic *forum* may not be a just rule of evidence or of a sufficient measure of proof in the courts of an alien country where enforcement of such right is sought. But without venturing upon a critical analysis of the English cases, it may be observed that it is at least extremely doubtful whether the English courts would consider the proofs here presented sufficient to establish the right of recovery in the domiciliary courts in a case like this. In some of the English cases based upon some of the statutes of Great Britain, it is held that organization and subscription of the full stock must be shown; in others, that the assessment was upon all the shareholders alike; in others, that under certain circumstances the liability on the shares does not constitute a debt; in another, under the Swansea dock act, where the place of business was Swansea, and fourteen days' notice of all public meetings was required by the statute to be given by advertisement in a paper circulating in the district of the company's principal place of businesss, notice was published in a Sunday London paper, and, at a meeting held in pursuance of the notice, change was made in the number of directors, it was held to be invalid and illegal because it did not appear that the paper reached Swansea; in others, that there must be properly appointed directors to make a call; in others, that the form of remedy must be strictly followed, and English authorities would seem to indicate, where no particular form was prescribed, that the remedy, as well as the question whether such courts would require evidence as to the internal management of the corporation, might depend upon the question whether the concern was a
95 going concern, or in process of winding up; in other cases,
that it must be made to appear that the requisite number of directors acted; in others, under certain circumstances, that it must be made to appear that there are debts of the company unpaid. I do not refer to these cases as having any decisive bearing upon any particular point before us, but merely as illustrating that in England, under certain circumstances, something more than organization, holding and assessment is required to be shown.

It is now a matter of common notoriety that the evils resulting from loose and unauthorized conduct and management under these English companies' acts are a matter of severe popular, parliamentary, and judicial criticism in England; and that in 1894 a committee was created by a London board of trade, which was presided over by Lord Davey. This committee in its report pointed out many of the evils incident to the system; and some of the principal evils were said to result from directors acting without qualification, or taking gifts of paid-up shares; from companies proceeding to allotment upon insufficient capital, from loading of the purchase-money in case of a company formed to purchase an existing business, or of the contract price in case of a company formed to construct and work an undertaking; from the non-disclosure in the

prospectus of facts material for the guidance of intending investors, and want of facilities on the part of the public for ascertaining the existence of mortgages and charges affecting the company's property. This committee reported an act intended to remedy notable and notorious evils, which became a law in 1900 (W. N., August, 1900, 188, 189; 38 L. R. 96, statutes 63 and 64 Vic.), and in it, among other things, the idea of conclusiveness is dealt with, and conclusiveness is only expressly carried to the certificate of incorporation, and to registration and matters precedent and incidental thereto, thus, by implication at least, presupposing a limitation upon the uncertain and unsafe doctrine of presumption and conclusiveness, if the doctrine may be said to exist, in respect to regularity of corporate and company proceedings subsequent to incorporation
96 tion and registration. I do not refer to recent English parliamentary criticism and having a decisive or even a direct bearing upon the question at issue, but to illustrate the point taken that we cannot with safety blindly accept as conclusive detached extracts from such business associations.

It was held by Mr. Justice Kekewich, in *National Debenture and Assets Corporation* (1891), 2 Ch. 505, that the certificate of incorporation could not be treated as conclusive of the fact that the statutory seven persons had signed the memorandum of association, and the court of appeals expressly agreed with Mr. Justice Kekewich's view of the law, Lord Justice Lindley stating that it was a condition precedent to registration under the act that the company should consist of seven members. Reasoning from such English requirements, it may at least be required here, as a condition of enforcement in this *forum*, that the plaintiff shall not only show a legal statutory organization, but that the proceedings have been regularly within the English statutes and the by-laws of the company, and in short, that the status of the corporation and its proceedings are in all respects within the law of England.

Bailey v. Burkenhead, 12 Beav. 433, 440, which the plaintiff cites in support of his position as to the reluctance of the English courts to inquire into the internal affairs of corporations, was the case of a going corporation and was a bill in equity without a proper joinder of the different classes of shareholders; still, because the English courts do not inquire into the internal affairs of going domestic corporations in a suit in favor of a stockholder, it does not follow that courts of a country alien to the corporation should be estopped from requiring proof upon the question whether the corporation is going or not, and, if not going, require evidence as to the corporate necessities.

However it may have been before, since the decision of the Supreme Court in *Concord First National Bank v. Hawkins*, 174 U. S. 364, a banking corporation is not estopped from setting up in avoidance of an assessment that its holdings are *ultra*
97 *vires*. If this may be done by a corporation in its own behalf, I see no reason why the stockholder may not set it up as against the corporation, especially in respect to matters of which he had no notice. If this may become a defence between domestic

shareholders, or corporate suitors, and if a foreign plaintiff may be required to make it appear that his foreign judgment of a court of general jurisdiction is founded upon due allegations and proofs, that its recovery was in accordance with the usual course of jurisprudence of a civilized country, and that the merits of the case were not extrajudicial, I see no reason why enforcement of a private foreign corporate assessment call, against a citizen shareholder of this country, by the courts of this country, may not without offending the principles of international comity, be made subject to the qualification that corporate regularity and full *intra vires* conditions shall be shown by the foreign suitor invoking the aid.

This is, as claimed, a contract, but it is not a simple contract like that of a contract of sale, or like that involved in a negotiable promissory note; on the contrary, it is a contract involving foreign corporate conditions and foreign statutory requirements, and enforcement being sought *extra regnum*, on grounds of comity, regularity or corporate proceedings and performance of statutory requirements by the party who sets up the contract should not be presumed, but should be shown by the party seeking its enforcement.

The general rule of comity, as to enforcement of the personal liability of a resident stockholder of a foreign corporation, is, that if it rests in contract merely, it will be enforced according to the law of the place of the contract, and if it grows out of a statute to which the corporation belongs, that it will generally be conceded and enforced, if the liability is in its nature contractual; but this is wholly upon grounds of comity, and may be altogether excluded, or enforced in a foreign country upon such terms and conditions as that country may think proper to impose. And this qualification is true even
in respect to our sisterhood of States: *Paul v. Virginia*, 8 Wall.
98 168, 181; *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181;
Boston Investment Co. v. Boston, 158 Mass. 461; *Fawcett v. Iron Hall*, 64 Conn. 170; 29 Atl. 614; *Pennsylvania Co. for Ins. on Lives v. Bauerle*, 143 Ill., 459; *People v. Pavey*, 151 Ill., 101; 37 N. E. 691; *Home Ins. Co. v. Davis*, 29 Mich., 238; *W. U. Tel. Co. v. Mayer*, 28 Ohio St. 521; *State v. Ackerman*, (Ohio Sup.), 37 N. E. 828.

Therefore, it is no answer to my position as to the measure of proof to be required, to say that holding the stock creates a contract. I concede that it is in the nature of a contract. But saying that this is a contract is no greater answer than saying, in case of a foreign judgment, that the plaintiff's right of recovery is founded on a judgment of a court of general jurisdiction, and the enforcement of such a foreign and alien right is safeguarded by requiring a judgment plaintiff to show something more than naked judgment. And so the enforcement of a supposed foreign corporate contract right may and should be safeguarded by requiring something more than the naked holding and assessment. While under the Federal Constitution judgments of our sister States are entitled to full credit, and, duly authenticated, prove themselves by their own weight and create an enforceable liability, judgments of alien countries, duly authenticated, do not prove themselves by their own weight and establish an absolute and enforceable liability, but require extrinsic explanation and support to that end. And by parity of reasoning and by force of close and almost controlling analogy, while assessments by domestic corporations under certain exceptional circumstances, and upon somewhat exceptional grounds, create an enforceable liability, assessments by foreign and alien corporations do not, necessarily, by force of an absolute and arbitrary rule create enforceable liability without extrinsic explanation and support.

The proceedings of a private foreign corporation without the semblance of a seal, or even with a seal, *must* stand upon less favorable ground *extra regnum*, both as to measure and burden of proof and as to conclusiveness, than the solemn and formal judg-
99 ments of courts of general jurisdiction of foreign and alien
countries. And questions as to the regularity and necessity of corporate assessments, and other material questions as to corporate proceedings, must stand less favorably as to presumption and intendment than the question of the authenticity of the solemn published statutes of Great Britain. So in this sense, private foreign corporate assessment proceedings and the transactions involved in the anterior corporate proceedings, do not possess any peculiar measure of merit, sanctity or solemnity, as evidence, above that possessed by the judgments of foreign courts of general jurisdiction, and there is no peculiar rule of conclusiveness applicable to private foreign corporate assessment rights not applicable to foreign judgment rights. Indeed, judgment rights are recognized as in the class of the highest and most solemn of rights, and if proofs may be required as to the regularity of foreign judgments we see no reason why this plaintiff, a foreign corporation, should not be put to full proof of corporate necessity, corporate regularity as to its proceedings, and to full proof as to the transactions being within the scope of the business originally contemplated by the association, or subsequently legally authorized.

And my conclusion is that the ordinary rules applying to domestic corporations as to burden and measure of proof do not apply to an alien corporation of the character of the one in question, and that the rule to be applied to alien corporate contracts should require the plaintiff to show that all material statutory and corporate requirements have been complied with, and that the conditions contemplated by the statutes and the common law of the country of the corporation actually exist. It is also my conclusion that under the rule as to the measure of proof which should be required in the courts of a country alien to the corporate domicile, that the pleadings in this case, together with the motion for a verdict, and the statement of the grounds thereof appearing in the record, operated to put the plaintiff to a larger measure of proof than was produced in its behalf at the trial, and that the objections and the exceptions sufficiently present to us the question as to the measure of
100 proof to be required in a case like this. This is not a denial
of right; it is not a denial of remedy; it is only a denial of the right of relief until the foreign suitor asking relief proves by evidence readily accessible to him, and not accessible to his adversary,

that the right exists and is founded in conditions which fairly and reasonably require its enforcement.

When, however, a foreign plaintiff like the one in question presents a case with a measure of proof showing that justice and comity require its enforcement (and in this connection comity is used in a sense as broad as that of justice), the right should be established and enforced in accordance with the law of England, and the remedy, subject to certain limitations, should be that employed for such purpose in that country, and this is for the reason, as said in *Railway Co. v. Gebhard*, 109 U. S. 537, that "a corporation must dwell in the place of its creation and cannot migrate to another sovereignty * * * and whatever control it is subject to at home must be recognized and submitted to by those who deal with its elsewhere." Such being the law, it follows that "every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government affecting the affairs and obligations of the corporation * * * as the known and established policy of that government authorizes."

Considerable was said upon argument against the remedy, but upon the question of the remedy, were the right established by proper proofs, I agree with my brethren. The decisions are numerous and controlling, that, if the statute creating the liability specifies a remedy, that remedy must be followed; but, if not specified, I think the right must be enforced according to the usual course of jurisprudence in the jurisdiction of the corporation. This has been repeatedly held in respect to assessment cases in our own country, and I see no reason why the same rule should not apply to English corporations, especially in view of the fact that the system of common law and equity jurisprudence of England prevails in this country so far as the same is not repugnant to our institutions. In this view the law of New Hampshire in respect to the sole
101 & 102 remedy of forfeiture of shares should not apply. Of
course the right is measured by the English law, subject to the qualifications in respect to the rule of evidence, the necessity and reasonableness of which I have undertaken to point out, and the rule for which I contend involves the idea that no intendment or presumption as to regularity of corporate proceedings should be accepted in favor of a foreign and alien corporation which sues here, and that we may and should adopt a different rule as to the burden of proof in respect to the material questions involved in an alleged right of recovery than that adopted by the domiciliary courts; and when the right is established the remedy is according to the remedy usually employed for the enforcement of such a right in England, the home of the corporation.

103 United States Circuit Court of Appeals for the First Circuit, October Term, 1900.

Nashua Savings Bank, Defendant, Plaintiff in Error,
v.
Anglo-American Land Mortgage and Agency Company, Limited, Plaintiff, Defendant in Error.
No. 303.

Judgment in Circuit Court of Appeals.

April 24, 1901.

This cause came on to be heard January 5, 1900, upon the transcript of the record of the circuit court of the United States for the district of New Hampshire, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the circuit court is affirmed.

By the court,

JOHN G. STETSON, *Clerk.*

104 United States Circuit Court of Appeals for the First Circuit.

Nashua Savings Bank, Defendant, Plaintiff in Error,
v.
Anglo-American Land Mortgage and Agency Company, Limited, Plaintiff, Defendant in Error.
No. 308.

Clerk's Certificate.

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that the printed pages, numbered 1 to 70, inclusive, hereto prefixed, contain and are a true copy of the writ of error to the circuit court of the United States for the district of New Hampshire, and the return of said circuit court thereon, in the cause entitled in said circuit court.

Anglo-American Land Mortgage and Agency Company, Limited,
v.
Nashua Savings Bank.
No. 420. Law Docket.

I further certify that said pages, numbered 1 to 70, inclusive, contain and are a true copy of the record upon which the said cause was heard in said circuit court of appeals, January 5, 1900.

I further certify that the printed pages, numbered 71 to 102, inclusive, hereto prefixed, contain and are a true copy of the opinion of said circuit court of appeals in said cause, and that the printed page, numbered 103, contains and is a true copy of the final judgment entered in said cause, April 24, 1901.

I further certify that said printed pages, numbered 1 to 103, inclusive, contain and are a true copy of the record and all proceedings in said cause in said circuit court of appeals, to and including June 14, 1901, and that a mandate has not issued.

In testimony whereof, I hereunto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston, in said first circuit, this fourteenth day of June, A. D. 1901.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN G. STETSON, *Clerk.*

105 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the first circuit, Greeting:

Being informed that there is now pending before you a suit in which Nashua Savings Bank is plaintiff in error and Anglo-American Land Mortgage and Agency Company, Limited, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of New Hampshire, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and 106 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of November, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

107 United States Circuit Court of Appeals for the First Circuit, October Term, 1901.

NASHUA SAVINGS BANK, Defendant, Plaintiff in Error,
vs.
ANGLO-AMERICAN LAND MORTGAGE AND AGENCY Company, Limited, Plaintiff, Defendant in Error.
No. 415.

Stipulation.

It is hereby agreed between the parties to the above-entitled cause that the certified transcript of the record and proceedings in this cause already filed in the Supreme Court of the United States by The Nashua Savings Bank, defendant, plaintiff in error, with its petition for a writ of certiorari, in the cause of The Nashua Savings Bank petitioner *vs.* Anglo-American Land Mortgage and Agency Company, Limited respondent, number 415 of the October term of that court for 1901, may be taken as the return to the writ of certiorari issued by the Supreme Court of the United States in that cause, on the 4th day of November, A. D. 1901, to the judges of the United States circuit court of appeals for the first circuit.

Dated New York Nov. 23″ 1901.

OMAR POWELL,
Attorney for Anglo-American Land Mortgage & Agency Co., Defendant in Error.
JOHN S. F. FUNK,
Attorney for Nashua Savings Bank, Petitioner.

108 *Return on Writ of Certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the judges of the United States circuit court of appeals for the first circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified transcript of the record and proceedings in this cause already filed in the Supreme Court of the United States by The Nashua Savings Bank, defendant, plaintiff in error, with its petition for a writ of certiorari in the cause of The Nashua Savings Bank, *vs.* The Anglo-American Land Mortgage and Agency Co., Limited, numbered 415 of the October term of that court for 1901, may be taken as the return of the writ of certiorari issued by the Supreme Court of the United States in that cause on the eleventh day of November, A. D. 1901."

Seal United States Circuit Court of Appeals, First Circuit.

In testimony whereof I, John G. Stetson, clerk of said United States circuit court of appeals for the first circuit, hereto set my hand and affix the seal of said court at Boston, in said first circuit, this twenty-fourth day of December, 1901.

JOHN G. STETSON, *Clerk.*

109 [Endorsed:] File No. 18,268. Supreme Court of the United States. No. 167, October term, 1902. Nashua Savings Bank *vs.* Anglo-American Land Mortgage and Agency Co., Limited. Writ of certiorari and return of the United States circuit court of appeals for the first circuit thereon. Filed Jan. 6, 1902.